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Supreme Court, U.S.
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No. 98-1390 FEB 17 1999

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

VICTOR LEVY-CORDERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Certiorari Should Be Granted To Answer A Question Important To The Administration Of Criminal Justice Regarding Application Of The Exclusionary Sanction Provided In Rule 12.1(D) Of The Federal Rules Of Criminal Procedure: Are A Defendant's Rights Under The Due Process And Compulsory Process Clauses Of Our Constitution Violated By Exclusion Of Exculpatory Alibi Witnesses Where The Duty To Provide Notice Of Alibi Defense Was Not Triggered By Written Demand From The Government, As Required By Rule 12.1(A) Of The Federal Rules Of Criminal Procedure, And Where Viability Of Alibi Defense Could Not Be Ascertained Until Testimony Of Government Witnesses Suggested New Time Frame For Charged Offense.

II. Certiorari Should Be Granted To Resolve Conflict Between The Circuit Courts Of Appeals Over Application Of The Compulsory Process Clause Analysis, Enunciated In *Taylor V. Illinois,* 484 U.S. 400 (1988), In Determining The Permissibility Of The Witness Preclusion Sanction For Willful And Non-Willful Discovery Rule Violations.

III. Certiorari Should Be Granted To Prevent Manifest Injustice Resulting From Erroneous Exclusion Of Material Alibi Defense Witnesses Whom The District Court Found To Be Credible And Reliable.

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I. CERTIORARI SHOULD BE GRANTED TO ANSWER A QUESTION IMPORTANT TO THE ADMINISTRATION OF CRIMINAL JUSTICE REGARDING APPLICATION OF THE EXCLUSIONARY SANCTION PROVIDED IN RULE 12.1(D) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: ARE A DEFENDANT'S RIGHTS UNDER THE DUE PROCESS AND COMPULSORY PROCESS CLAUSES OF OUR CONSTITUTION VIOLATED BY EXCLUSION OF EXCULPATORY ALIBI WITNESS TESTIMONY WHERE THE DUTY TO PROVIDE NOTICE OF ALIBI DEFENSE WAS NOT TRIGGERED BY WRITTEN DEMAND FROM THE GOVERNMENT, AS REQUIRED BY RULE 12.1(A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND WHERE VIABILITY OF ALIBI DEFENSE COULD NOT BE ASCERTAINED UNTIL TESTIMONY OF GOVERNMENT WITNESSES SUGGESTED NEW TIME FRAME FOR CHARGED OFFENSE.

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VICTOR LEVY-CORDERO,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner, Victor Levy-Cordero, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The Opinion of the District Court for the District of Puerto Rico entered in this case on June 10, 1993 is reported at 833 F.Supp. 938 (D.P.R. 1993) and is reproduced in the Petitioner's Appendix hereto at App. at 1.

The Opinion of the United States Court of Appeals for the First Circuit entered in this case on October 16, 1995 is reported at 67 F.3d 1002 (1st Cir. 1995), *rehearing and suggestion for rehearing en banc denied* (Dec. 12, 1995), *cert. denied*, 517 U.S. 1162 (1006), and is reproduced in the Petitioner's Appendix hereto at App. 45.

The disposition of the First Circuit Court of Appeals on the Government's "Motion for Modification and Correction of Opinion," entered on November 7, 1995, is reproduced in the Petitioner's Appendix hereto at App. at 115.

On remand, the evidentiary rulings of the Honorable Raymond L. Acosta, United States District Court for the District of Puerto Rico, are

reproduced in the Petitioner's Appendix hereto at App. 118.

The Judgment of the United States Court of Appeals for the First Circuit entered in this case on September 17, 1998 is reported at 156 F.3d 244 (1st Cir. 1998), and is reproduced in the Petitioner's Appendix hereto at App. at 121.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on September 17, 1998. A timely Petition for Rehearing and Rehearing *En Banc*, together with a motion to supplement the record and motion to stay mandate pending application for writ of certiorari was filed on October 15, 1998, and was denied on November 19, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

i. **Course of Proceedings and Disposition Below.**

Petitioner, Victor Levy-Cordero, appealed his conviction in the United States District Court for the District of Puerto Rico on one count of conspiracy, one count of importing marijuana, and one count of possessing marijuana with intent to distribute.

Petitioner Levy was charged in three counts of a thirty-nine count superseding indictment because he allegedly assisted in the importation of one "load" of marijuana sometime in "March or April of 1987." The district court excluded the Petitioner's crucial, material alibi evidence for a purported "willful" violation of a discovery order requiring pre-trial notice of intent to offer an alibi defense. The Petitioner argued that the government had never issued a written demand for notice of alibi pursuant to Federal Rule of Criminal Procedure 12.1(a), and that Omnibus Order No. 7,

the discovery order allegedly violated, referred only to those defendants who had received a written demand from the government. Moreover, when trial commenced in November, 1987, the Petitioner did not believe that a viable alibi defense even existed.

United States V. Levy-Cordero, 67 F.3d 1002 (1st Cir. 1995).

After reviewing the record, the First Circuit Court of Appeals found that the "district court's decision lacks record support," and held that:

1. Defense counsel had properly relied on the government's representations prior to trial, and the allegations in the superseding indictment which had occurred more than five years prior to Mr. Levy-Cordero's arrest made it difficult to investigate an alibi defense. Further, "the time frame provided by the government prior to trial was changed at trial by the testimony of *a government witness*. App. 83.

2. Defense counsel had provided the

government with all documentation and subpoena information relative to the Appellant's alibi defense as it was received. Pet. App. 84.

3. The record was not clear "with respect to whether counsel *was ever* ordered to provide notice of its intention to present an alibi defense" because "the government *never* issued a Rule 12.1(a) demand to Levy-Cordero." App. 84. (emphasis added).

4. There was no justification for the district court's conclusion that the "truth determining function of the trial process was at risk" by the presentation of the notice of alibi defense at trial, quoting *Williams v. Florida*, 399 U.S. 78, 81 (1970), in accordance with *Taylor v. Illinois*, 484 U.S. 400, 414-415 (1988). App. 88. Significantly, the First Circuit Court of Appeals concluded "that neither the integrity of the adversary process nor its truth-seeking function is threatened by the introduction of the alibi evidence." App. 79. The case was, therefore,

remanded for an evaluation of the content and reliability of the evidence, since the district court "did not make specific findings with regard to the reliability of the proposed alibi evidence." App. 88.

District Court's Failure To Conduct Evidentiary Hearing On Proffered Alibi Evidence Not Considered "Harmless Error."

The district court's failure to hold an evidentiary hearing on the appellant's alibi evidence was not deemed harmless error because there was a "reasonable possibility that exclusion of the proffered alibi evidence influenced the verdict . . . If the alibi evidence was reliable and relevant to the pertinent time period, the jury may have considered it more persuasive than the testimony of two co-conspirators." App. 92. The Petitioner submits that this is still the case.

On Remand, District Court Ruled Alibi Evidence Was Credible and Reliable.

The Honorable Raymond L. Acosta, Senior United States District Court Judge for the District of

Puerto Rico, presided over the January 18, 1996 evidentiary hearing and found "that the evidence presented in support of an alibi defense during the course of this hearing was reliable" and further found that "the failure [of defense counsel] to notify the alibi defense at an earlier date was not willful." App. 119.

Petitioner's Supplemental Brief.

The Petitioner's Brief, filed on April 23, 1998, stressed that the district court's evidentiary rulings as to the credibility and reliability of his alibi evidence should be affirmed, in accordance with the well-settled law that appellate courts must not substitute their judgment for a district court's findings of fact and credibility determinations. The Petitioner demonstrated good faith by promptly notifying the prosecutor that the plausibility of an alibi defense was being investigated.

Government's Supplemental Brief Misconstrues Proffered Testimony And Alibi Testimony At Evidentiary Hearing.

The government argues that the Petitioner has "repeatedly maintained that he was *in Miami* until March 28 or 29 or 30, 1987 and thus, was unavailable to participate in the importation of marijuana *into Puerto Rico* on those dates." This representation misconstrues the record, specifically Petitioner's Offer of Proof, which states that he returned to Puerto Rico "*on or about* March 28 or 29, 1987." (emphasis added). The government's position that this testimony evince the intentional creation of "a second alibi"is therefore, unfounded.

The government took issue with testimony at the evidentiary hearing which placed the Petitioner in the company of friends at a disco on the evening of March 27, 1987, where his Offer of Proof indicated he spent a "romantic evening" with his girlfriend, As a matter of fact, the proffer merely alleged that the Petitioner spent the night with his girlfriend upon his return to Puerto Rico from Miami. The fact that some details addressed at the evidentiary hearing were not mentioned in the

Proffer have been mentioned in the Proffer is of no consequence.

The government also claimed that Petitioner's alibi testimony was fabricated because the preferred testimony stated that Lourdes Zabala, his former girlfriend, met the Petitioner at the Luis Munoz Marin Airport in San Juan on March 27, 1987, Puerto Rico, where the testimony presented at the 1996 evidentiary hearing reflects that the Petitioner left the airport with his friend, "Moncho."Ms. Zabala's preferred testimony is not rendered false because other witnesses testified at that they, too, went to meet the Petitioner at the airport.

The testimony of Vicente Rodriguez Rivera provides a simple explanation for this perceived inconsistency. Rodriguez-Rivera testified that he went to the airport in a van in order to pick up the "wheels" which the Petitioner was bringing back from Florida, and that the Petitioner did not ride in the van with him to his (Rodriguez-Rivera's) home

"[b]ecause Moncho's wife and his friend,the lady accompanying him, went there to pick him up." The lady that was the Petitioner's girlfriend, Lourdes Zabala.

The Petitioner's sister-in-law, Rosa Levy, testified at the evidentiary hearing that upon his return to Miami from Orlando on March 23, 1987, the Petitioner stayed at her home "for about five to seven days," before departing for Puerto Rico. At five days, he would have returned to Puerto Rico on Friday, March 27, 1987, and at seven days, on the 29th of March. This testimony is not inconsistent with the 1992 Offer of Proof, nor with the testimony of other alibi witnesses.

ii) **Statement Of The Facts.**

Government cooperating witness Angel Rosa Collazo alleged that in early 1987 he contacted co-conspirators Samuel Forty Estremera an Cesar Castro for assistance in the importation of a quantity of marijuana from Colombia to Puerto Rico. Castro was to secure a boat to off-load the

marijuana from a mother ship and to recruit persons to assist in the task. He allegedly recruited the Petitioner to assist in the importation of the marijuana, yet admitted that he did not hire the Petitioner.

There was conflicting testimony as to the exact dates of the importation. The marijuana was off-loaded over the course of several nights, and the Petitioner's boat, "La Bebe," was allegedly utilized on the first night's off-load activities. Collazo was never present for any of these events, but received reports afterwards. Collazo claimed that Castro put the Petitioner on the telephone when Collazo was speaking to Castro on the telephone. Other than Collazo, the only witnesses who inculpated the Petitioner were two individuals who testified as to the Petitioner's ownership of the boat, "La Bebe."

Angel Collazo's Contradicted Testimony.

Cesar Castro and Juan Cruz Matos, who were present and involved in the charged criminal conduct, signed affidavits swearing unequivocally

that the Petitioner was not on the smuggling boat, that he was not involved, and had been unjustly convicted. In fact, Cesar Castro's affidavit contradicts Collazo's inculpating testimony.

At trial, Collazo was not able to testify that he saw the Petitioner on the vessel which transported the marijuana. Nor did Collazo testify that he spoke with the Petitioner during his [Collazo's] numerous calls to the vessel. Collazo simply stated that he was *told* that the Petitioner was on the transporting vessel.

Notably, Collazo's trial testimony was substantially contradicted by the testimony Cesar Gomez. Gomez swore that he never spoke with Angel Rosa Collazo on the telephone about his three-hour journey from St. Croix to Puerto Rico, and that he didn't *even see* the Petitioner on his ship, its accompanying vessel, or in St. Croix.

Miles Johnson's Contradicted Testimony.

Codefendants Estremera and Johnson rented a house in Naguabo, Puerto Rico to store Collazo's

marijuana. Collazo's testimony as to importation date was contradicted by Miles Johnson, who also admitted that his trial testimony differed from his testimony before the grand jury.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO ANSWER A QUESTION IMPORTANT TO THE ADMINISTRATION OF CRIMINAL JUSTICE REGARDING APPLICATION OF THE EXCLUSIONARY SANCTION PROVIDED IN RULE 12.1(D) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: ARE A DEFENDANT'S RIGHTS UNDER THE DUE PROCESS AND COMPULSORY PROCESS CLAUSES OF OUR CONSTITUTION VIOLATED BY EXCLUSION OF EXCULPATORY ALIBI WITNESS TESTIMONY WHERE THE DUTY TO PROVIDE NOTICE OF ALIBI DEFENSE WAS NOT TRIGGERED BY WRITTEN DEMAND FROM THE GOVERNMENT, AS REQUIRED BY RULE 12.1(A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND WHERE VIABILITY OF ALIBI DEFENSE COULD NOT BE ASCERTAINED UNTIL TESTIMONY OF GOVERNMENT WITNESSES SUGGESTED NEW TIME FRAME CHARGED OFFENSE.

> The right to offer the testimony of witnesses . . . Is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967).

Prior to the Supreme Court's decision in *Taylor, supra*, the emphasis for a balancing test to meet Sixth Amendment standards began with a presumption *against* exclusion of otherwise admissible defense evidence. *Fendler v. Goldsmith*, 728 F.2d 1181, 1188 (9th Cir. 1984). This presumption called for closer scrutiny of defense witness preclusion. *Braunskill v. Hilton*, 629 F. Supp. 511, 522 (D.N.J. 1986), *aff'd.* 808 F.2d 1515 (3rd Cir.), vacated, 822 F.2d 52 (3rd Cir. 1987), citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The case at bar evinces the real prejudice that

inures where material alibi defense witnesses are erroneously excluded, and makes a strong case for closer scrutiny of defense witness preclusion. Presently, the circuit courts of appeals are divided in the factors considered relevant when imposing exclusionary sanctions. Consequently, where a defendant, like the Petitioner, has not violated Federal Rule of Criminal Procedure 12.1(b), he may still be penalized in an arbitrary fashion.

"Pursuant to the "federal rules, a defendant . . . is only required to provide notice when the government demands it." *United States v. Braxton*, 877 F.2d 556 (7th Cir. 1989). "If the Government does not take advantage of Rule 12.1 as to particular time, date and place it cannot claim unfair surprise when the defense brings forth alibi witnesses at trial. *United States v. Myers*, 500 F.2d 1035 (3rd Cir. 1977); Moore's Federal Practice para. 12.01.02 (1982).

In *United States v. Bouye*, 688 F.2d 471, 475 (7th Cir. 1982), the Seventh Circuit Court of Appeals explained:

> If the government fails to trigger the procedures, and if the defendant raises an alibi at trial, then the government cannot claim surprise and get a continuance of the trial. Since the government in this case did not make a written demand under Rule 12.1, the reciprocal obligation under Rule 12.1(b) was not triggered. This conclusion is consistent with other circuits that have considered this issue.

(Citations omitted).

Without a violation of any clearly-established rule or duty, the drastic sanction of precluding a witness altogether is unwarranted. *Untied States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991)(Finding it improper to exclude expert witness in the absence of underlying discovery violation). This case illustrates the need for greater scrutiny over exclusion of alibi witnesses in criminal cases.

> The stakes in criminal prosecutions are always high, and defendants' Sixth Amendment rights must be protected to ensure that the truth is ultimately found. Indeed, the Supreme Court has suggested that even for direct discovery violations, sanctions other than preclusion would be "adequate and appropriate in most cases."

United States v. Harvey, 117 F.2d 1044 (7th Cir. 1997), citing *Taylor, supra*, 484 U.S. At 413.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS OVER APPLICATION OF THE COMPULSORY PROCESS CLAUSE ANALYSIS, ENUNCIATED IN *TAYLOR V. ILLINOIS*, 484 U.S. 400 (1988), IN DETERMINING THE PERMISSIBILITY OF THE WITNESS PRECLUSION SANCTION FOR WILLFUL AND NON-WILLFUL DISCOVERY RULE VIOLATIONS.

A split in the circuits exists regarding the permissibility of excluding evidence solely as a sanction for a defendant's failure to comply with discovery rules.

The First Circuit Court of Appeals found the use of surprise tactics as offensive to the truth-finding process as is perjury, in *Chappee v. Vose*, 843 F.2d 23 (1st Cir. 1988). The First Circuit also applied each of the Taylor factors when considering sanctions for a non-willful violation of a discovery rule in *Bowling v. Vose*, 3 F.3d 559, 562 (1st Cir. 1993), *cert. denied* 114 S.Ct. 1236. The case at bar is most analogous to *Bowling*, because the Petitioner, like Bowling, did not violate any discovery rules. It is respectfully submitted that the First Circuit's October 16, 1995 opinion, *Levy I*, should be reaffirmed, since the First Circuit Court of Appeals has acknowledged that the Petitioner had not violated the notice of alibi discovery rule.

In *United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992), the District of Columbia Circuit

Court construed *Taylor, supra,* as not requiring bad faith to constitutionally preclude exculpatory testimony. Conversely, in *United States v. Peters,* 937 F.2d 1422, 1426 (9th Cir. 1991), witness preclusion was held impermissible absent a willful discovery violation, and in *Eckert v. Tansy,* 936 F.2d 444, 446-47 (9th Cir. 1991), the Ninth Circuit reviewed most of the *Taylor* factors when considering a willful discovery rule violation.

The Seventh Circuit Court of Appeals addressed willful conduct, and no other considerations in *United States v. Mitan,* 966 F.2d 1165, 1175-76 (7th Cir. 1992), *cert. denied,* 113 S.Ct. 994 (1993) and in *Tyson v. Trig,* 50 F.3d 436 (7th Cir. 1995), the Seventh Circuit found that the defense, in violating a discovery order, did not act willfully nor in bad faith.

Less drastic sanctions than preclusion have generally been held appropriate in the absence of wilful conduct. In *Escalera v. Coombe,* 852 F.2d 45 (2nd Cir. 1988), the Second Circuit Court of Appeals

ruled that failure to comply with a discovery rule must be "motivated by a desire to gain tactical advantage" in order to warrant preclusion under *Taylor, supra.*

A majority of the courts have found that the interest of preventing surprise at trial *is outweighed* by the defendant's constitutionally guaranteed right to call witnesses in his own behalf. *Fendler v. Goldsmith,* 728 F.2d 1181, 1187 (9th Cir. 1983) (finding error when trial court precluded testimony of two witnesses for failure to provide prosecution with their addresses); *Braunskill v. Hilton,* 629 F.Supp. 511, 523, 525 -- 526 (D.N.J. 1986) (finding reversible error when state court precluded habeas corpus petitioner's alibi witness from testifying because defense filed untimely response to State's discovery request).

While witness preclusion is discretionary, the foregoing authority reflects the panoply of criteria utilized by trial courts when imposing exclusionary sanctions, sometimes arbitrarily.

III

CERTIORARI SHOULD BE GRANTED TO PREVENT MANIFEST INJUSTICE RESULTING FROM ERRONEOUS EXCLUSION OF MATERIAL ALIBI DEFENSE WITNESSES WHOM THE DISTRICT COURT FOUND TO BE CREDIBLE AND RELIABLE.

It is manifestly unjust to deprive a criminal defendant his alibi witnesses where, as in this case, the government alleges that the charged crime occurred many years ago, and the defendant cannot quickly reconstruct his whereabouts at the time.

Bowling v. Vase, 3 F.3d 559 (1st Cir. 1993). Fed.R.Crim.P. 12.1(e) does provide that the court may excuse either party from the disclosure requirements "[f]or good cause shown." *United States v. Quesada-Bonilla,* 952 F.2d 597 (1st Cir. 1991) (although government gave defendant name of its alibi rebuttal witness 27 days after defense notice of alibi rather than within 10 days as specified by rule, district court acted within discretionary powers in deciding not to forbid witness to testify on grounds

of late disclosure). Therefore, even if the District Court did not agree that the Petitioner was not obligated to provide his notice of alibi defense to the prosecutor, who had not provided the Petitioner with a written demand pursuant to Fed.R.Crim.P. 12.1, the Court could have lawfully made an exception pursuant to Fed.R.Crim.P. 12.1(e), in light of the many years that had passed since the offense date.

Alibi Witnesses Found Credible Following Cross Examination On Remand.

The motivation of Petitioner's alibi witnesses, like the motivation of criminal defendants testifying pursuant to a plea agreement, is "to be tested in the crucible of cross-examination." *United States v. Laboy-Delgado*, 84 F.3d 22, 27 (1st. Cir. 1996). The alibi witness testimony has been tested by the prosecutor and the trial court, and found to be reliable and credible. The district court's findings should therefore be accorded great deference. *United States v. Adams*,

403 F.2d 840 (7th Cir. 1968)(Credibility determinations are generally not reviewable on appeal).

Proffer of Alibi Witness Testimony.

> An effective offer of proof enables a trial judge to determine whether the evidence would be available for any purpose, and ensures that the record will be sufficiently detailed to permit appellate review of scope and effect of ruling, so that it can determine whether the trial court committed reversible error in excluding the evidence.

United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 647 (7th Cir. 1982), quoting Weinstein's Evidence, ¶103[03] at 103-27 (1977). While the Petitioner's typed Offer of Proof necessarily could not describe all of the Petitioner's activities upon his return to Puerto Rico from Miami, Florida on the weekend in question, it was sufficiently accurate

to show that the Petitioner's representations, that he had not returned to Puerto Rico on March 23, 1987, were truthful.

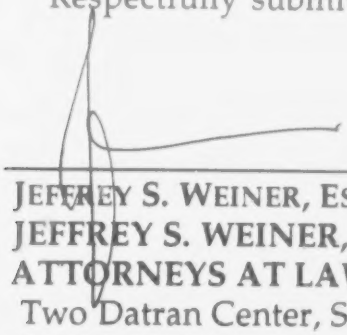
The Offer of Proof was substantiated by the alibi witness testimony at the 1996 evidentiary hearing before the District Court. The Court personally heard the argument of counsel at time of trial, and observed the demeanor of alibi witnesses at the evidentiary hearing on remand. Therefore, there is ample record support for the Court's credibility determination, which is far from erroneous.

The government has failed to show that there is no reasonable possibility that exclusion of the Petitioner's crucial, material alibi evidence was not "harmless beyond a reasonable doubt." Indeed, there *is* a 'great possibility' that exclusion of the proffered alibi evidence influenced the jury's verdict in this close case.*See United States v. Mulinelli-Navas*, 111 F.3d 953 (1st. Cir. 1997), citing *Levy I.* (emphasis added).

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully submits that this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Appellee,

vs.

VICTOR LEVY CORDERO,

Defendant- Appellant.

CR. NO: 91-299 (RLA)

June 10, 1993.

Before

Acosta, District Judge.

Guillermo Gil, Sr. Trial Atty., U.S. Dept. of Justice, Guaynabo, PR, for plaintiff.

Robert L. Moore, Law Office of Moore and Rabin, P.A., Miami, FL, for defendant.

ORDER ENTERING FINDINGS WITH RESPECT TO THE EXCLUSION OF ALIBI EVIDENCE

On December 11, 1992, in the midst of trial in this action, the Court denied Victor Levy's motion for reconsideration of exclusion of alibi evidence. [FN1] At that time, due to time constraints, the

Court issued its ruling from the bench, to be followed by written findings. [FN2] We hereby set forth for the record our findings regarding the preclusion of defendant's alibi evidence.

FN1. See Defendant Victor Levy Cordero's Offer of Proof and Detailed Proffer of Alibi Defense ..., docket No. 1004, filed on December 11, 1992.

FN2. Defendant also made this issue his main point of contention in his Motion for New Trial, see docket No. 1032, filed on December 28, 1992; Memorandum ... in Support of Order of New Trial ..., docket No. 1155, filed on March 12, 1993 and Reply to Government's Memorandum in Opposition ..., docket No. 1185, filed on April 19, 1993. The Motion for Leave to Reply ... is GRANTED. See also Government's Response to ... Motion for a New Trial, docket No. 1169, filed on April 7, 1993.

LEVY'S ALIBI

Defendant Levy Cordero was not accused in the original indictment. He was first charged in the superseding indictment issued on March 20, 1992 and only in Counts One, Two and Three out of a total of 39 counts. He was charged with conspiracy, importation and possession with intent to distribute approximately 5,000 pounds of marihuana "in March or April of 1987". Defendant was arrested in Miami on June 17, 1992 and brought to this district on July 17, 1992.

Levy's alibi is that he was in Florida from March 19, 1987 through March 28- 29, 1987. He listed approximately six witnesses and extensive documentary evidence such as travel agency records, bank card charge records, photographs, arrest records and car purchase records in support of this alibi defense. Alternatively, he argues that the evidence at trial showed that the marihuana load came in prior to March 20, 1987 and hence, the crimes charged in the indictment are barred by the

statute of limitations.

CASE MANAGEMENT

It is befitting at this time to provide the background of the case so that the reader may better comprehend the factual dimensions of this action. This case involves an intricate multi-defendant, international conspiracy organized to import and distribute narcotics in Puerto Rico and the United States. The case commenced on September 10, 1991, with the filing of an indictment charging 30 counts against 28 defendants. [FN3] A superseding indictment was subsequently filed on March 20, 1992, charging 39 counts against 39 defendants. [FN4] Due to the large number of defendants and the volume of motions generated by each of them with respect to discovery, pretrial detention or release as well as numerous other issues, the Court chose to intervene early in the case [FN5] in an effort to manage it efficiently by streamlining the discovery process, facilitating service and filing of pleadings [FN6] as well as ensuring the prompt

disposition of matters submitted for its consideration. Accordingly, we issued a series of case management, discovery and plea bargaining orders to directly oversee and supervise the development of the case. See, e.g., First Case Management Order, docket No 546, Order in the Matter of Special Requirements for Filings ..., docket No. 547 and Omnibus Order No. 3, In the Matter of Further Discovery and Plea Agreements, docket No. 548, all filed on May 8, 1992. See also Omnibus Orders Nos. 1-8. These management methods proved effective in consolidating the motions filed, avoiding duplicity of pretrial and discovery proceedings and allowing for a speedier resolution of the myriad issues presented.

FN3. This case was originally assigned to the docket of the Hon. Gilberto Gierbolini and was transferred to the undersigned's docket on January 8, 1992. See docket No. 316.

FN4. See docket No. 358.

FN5. See, e.g., docket Nos. 82 and 208, issued by Judge Gierbolini on September 19 and October 21, 1991, respectively.

FN6. To date, there are more than 1200 docket entries.

As part of the pretrial discovery procedures, the Government disclosed its evidence in accordance with the provisions of Rule 16(a) [FN7], and on August 21, 1992, with the imminence of trial, set for September 9, 1992, it filed a Motion for Discovery Pursuant to Rule 16(b) ..., docket No. 770, seeking reciprocal discovery from the six remaining defendants [FN8] who, at that time, were expected to go to trial. [FN9] On September 1, 1992 trial had to be continued sine die due to unforeseen complications. [FN10]

FN7. See e.g., Omnibus Order No. 3, docket No. 548 and Government's Consolidated Response to Defendants' Second Master Discovery Motion, docket No. 591, filed on June 9, 1993.

FN8. By late August, 1992, 28 of the 39 defendants charged in the indictment had pleaded guilty or were in the process of doing so; six remained fugitive; one was under mental evaluation and only six remained for trial, i.e., Jose S. Forty Estremera, Nelson Mantecon Zayas, William Romero Lewis, Agustin Morales, Rene Rodriguez Roig and Victor Levy Cordero.

FN9. The trial date had been programmed since the July 14, 1992, Status Conference and strictly adhered to in an effort to avoid calendar conflicts with counsel participating in another multi-defendant criminal trial pending in this district.

FN10. The Metropolitan Correctional Center in

Miami, where some of the Government's witnesses were detained, was struck by Hurricane Andrew, forcing the evacuation of the prison population to other institutions for an undetermined period of time. Additionally, another multi-defendant case before a fellow judge of this district and which involved several of the same attorneys as this action was put on calendar for trial in September. See Order Continuing Trial Date, Scheduling Status Conference and Setting Deadline for Notice of Alibi, docket No. 787 filed on September 1, 1992.

On September 2, 1992, the Court granted the Government's motion for Rule 16(b) discovery and ordered the five remaining defendants [FN11] to submit the required reciprocal evidence to the Government no later than September 21, 1992. A Status Conference for October 8, 1992 to discuss trial preparation and availability of counsel for alternative trial dates was also scheduled for October 8, 1992. [FN12]

FN11. Remaining defendants were Levy Cordero, Forty-Estremera, Mantecon-Zayas, Rodriguez Roig and Romero Lewis. Agustin Morales had by that time filed a motion for change of plea; see docket No. 778, filed on August 27, 1992.

FN12. See Omnibus Order No. 6, docket No. 789.

At the October 8th Status Conference, the Government again requested reciprocal discovery, claiming that despite the September 21 deadline set by the Court, the only information furnished to date had been the alibi [FN13] material provided by Forty's counsel in response to the Government's demand therefor pursuant to Rule 12.1. [FN14] At that time, a lengthy discussion ensued between defense counsel and the Court regarding the feasibility of presenting an alibi defense at trial due to the limitations imposed by the "on or about" time frames alleged in the indictment. [FN15] This colloquy led defense counsel to move the Court for

leave to submit alibis which would, in effect, not be "airtight", due to the indeterminate dates of the charged offenses. In response, the Government moved the Court to require those defendants who intended to avail themselves of an alibi to provide notice therefor within a short period of time so that the Government could adequately prepare itself to respond to the defense at trial. The Court granted this request and ordered that all alibi notices be submitted no later than November 2, 1992. A week later, on October 15, 1992, in Omnibus Order No. 7, the Court reset trial for November 18, 1992, [FN16] revised its schedule and again ordered defendants who intended to offer an alibi defense to provide notice thereof, this time no later than October 26, 1992. [FN17]

FN13. The Government had formally requested disclosure of alibi information from this defendant on August 21, 1992, because Forty Estremera had made it known to the Government that he

intended to present such a defense at trial.

FN14. See docket No. 769, filed on August 21, 1992.

FN15. Robert Moore, Esq., counsel for defendant, did not take part in the discussion of this issue. He did, however, state for the record that he had no reciprocal discovery to provide to the Government at that time, but that when he did he would make it immediately available to the Court and the Government. He added that many of the documents he was intending to use would require service of subpoenas.

FN16. The other multi-defendant trial involving common defense counsel had been rescheduled for January. See supra, note 10.

FN17. The Order, where pertinent, provided as follows:

DEFENDANTS REMAINING FOR TRIAL

It appearing that the trial in Cr. No. 90-130 (PG), United States v. Eusebio Escobar De Jesus, initially scheduled to begin on October 14, 1992, has been postponed until January, 1993, all parties are advised that the trial of this action is hereby scheduled for Wednesday, November 18, 1992, at 9:00 a.m.

Accordingly, all those defendants intending to offer an alibi defense shall serve the Rule 12.1(a) Fed.R.Crim.P. Notice of Alibi upon the Government no later than October 26, 1992. The Government's disclosure pursuant to Rule 12.1(b) Fed.R.Crim.P., shall be served upon defendants no later than November 10, 1992. (emphasis in original)

In light of Omnibus Order No. 7, defendants Nelson Mantecon Zayas [FN18], William Romero Lewis and Rene Rodriguez Roig filed alibi notices on October 14, 28 and 30, respectively. [FN19] They did so in response to this Court's Order even though the Government had not filed a written demand for alibi disclosure individually as to each of them. The two other remaining defendants, Victor Levy Cordero and Daniel Cruz Torres [FN20] did not submit notices of alibi.

FN18. Defendant Mantecon Zayas subsequently pleaded guilty and did not go to trial.

FN19. See docket Nos. 845, 874 and 882.

FN20. Defendant Cruz Torres had been found incompetent to stand trial and had been committed to the Butner Correctional institution in July of 1992 for follow-up treatment. He did not go to trial with the other defendants.

TIMING--PRIOR NOTICE

Initially defendant Levy Cordero's counsel argued vehemently that he did not prepare an alibi for March because he was misled by the Government into believing it was April when the alleged offense charged in the indictment was supposed to have taken place. To that effect Mr. Moore stated as follows during the December 9, 1992 proceedings:

> So, based upon the dates that the Government says we had no alibi for the month of April. The accusation in the case is March or April. I don't want to go before a jury, present a defense that he can drive a mack truck through, that has a hole it big enough for the government to drive a mack truck through, so I don't even get into it. I don't even get into it. Don't consider an alibi. And it was never looked into, for the month of April.

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We never considered the month an alibi for the month of March, because having an alibi for the month of March, if the month of April is what the government's case is going to prove, is worthless so it was never considered. Never considered. And I relied, absolutely relied, my client relied and I relied to our detriment upon those representations.

December 9, 1992 Trial Transcript pp. 36-37.

Your Honor, just understand something, for me to come in here with an alibi for the end of March ad present that kind of evidence in this case and to give the Government notice of that kind of evidence, spend resources to put that kind of evidence together in a case where the evidence could show anywhere between March and April is a waste of time, waste of

energy and something that I would never do.

December 9, 1992 Trial Transcript pp. 43-44.

So, my alibi takes me through the end of March. Now, you say end of March, well you know about that. But I never intended in pretrial to put on alibi evidence because I had no way of establishing my client's presence in the month of April, which is when I was told the month occurred.

December 9, 1992 Trial Transcript p. 55.

Despite these assertions, however, counsel was informed by the Government in writing, on no less than two occasions, that the charged marihuana shipment specifically had taken place in late March [FN21] or "the end of March 1987" [FN22]. See December 9, 1992 Trial Transcript p. 46. An attorney with the experience of defense counsel would have undoubtedly ensured before going to trial that a thorough investigation of all time

periods in March, particularly the end of March, 1987 would have been conducted to eliminate any doubts as to his client's whereabouts during the crucial time period charged in the indictment. [FN23]

FN21. "No earlier than March 22 ... or March 24, 1987". See Government's Consolidated Response to Defendant's Pre-trial Motions at page 3 (docket No. 764, filed on August 19, 1992).

FN22. Government's May 27, 1992 letter to attorney Rafael Anglada (Cesar Castro's attorney) regarding the date that the marihuana shipment charged in Counts two and three of the indictment allegedly occurred. This letter was part of the discovery that counsel for Levy Cordero received from the Government in July of 1992. See docket No. 691, filed on July 14, 1992, Minutes of July 14, 1992 Status Conference, wherein the Court ordered the Government to provide the discovery materials to

Mr. Moore no later than July 24, 1992.

FN23. From the date of Levy's arrest on June 17, 1992 to the commencement of trial on November 18, 1992, defense counsel had five months to research, investigate, and establish his client's whereabouts during the crucial days of March and April of 1987, as charged in the only two substantive counts (involving only one shipment) that incriminated him in the indictment. Indeed, having been informed in two occasions that the evidence pointed to the end of March, there was no reason for either of them to assume that the Government's evidence at trial would be focused on the April 1987 indictment dates only.

Defendant's counsel argues that it was not until trial that it became clear to him that the charged marihuana off-loading operation could not have taken place in April of 1987 as he alleges the Government had indicated but rather, that it took

place, according to his calculations, on the weekend before March 20, 1987. [FN24] Counsel also contends that they were impeded from putting the alibi defense information together prior to the date he announced it (December 7, 1992) because the Government knowingly withheld crucial information regarding the date of the importation of the marihuana load into Puerto Rico and that it wasn't until codefendant Miles Johnson testified [FN25] that he and his client were able, in a last minute attempt, to assemble the alibi defense. See Emergency Motion for Leave to File His Belated Notice of Intention to Introduce Alibi Evidence ..., docket No. 996, filed on December 7, 1992.

FN24. The 20th day is crucial because the superseding indictment in this case was returned on March 20, 1992. Crimes charged in the indictment would be barred by the statute of limitations if they occurred prior to March 20, 1987.

FN25. Miles Johnson testified on November 30, and December 1, 1992.

Counsel reaches this conclusion after stitching together a series of unrelated facts in an effort to erect what he calls an "unassailable" alibi. In the course of doing so, however, counsel makes several contradictory assertions as to the alleged dates that he and/or Levy discovered that they had an alibi to present. The dates crucial to this issue are: 1) date of Miles Johnson testimony; 2) date defendant allegedly received DUI (driving under the influence) report from Florida State officials; and 3) date of the alleged weekend visit to the State Penitentiary to visit Cesar Castro Gomez.

In the first "emergency motion" for leave to file an alibi (docket No. 996), counsel argues that it was Miles Johnson's testimony as to the date when the co-conspirators took possession of the stash house and the alleged period of time that elapsed before the load arrived that permitted him to pin

down the dates for which he could provide an alibi. Miles Johnson testified on November 30 and December 1, 1992.

In his second motion of offer of proof and proffer of alibi evidence, (docket No. 1004) counsel claims that something was said or stated at trial that allegedly triggered a recall in the defendant's mind of a red BMW car. This recollection, combined with a subsequent weekend visit (during trial) to codefendant Cesar Castro at the State Penitentiary wherein counsel and defendant confirmed Castro's purchase of the car, set off a "chain of events" that culminated with their obtaining a copy of Levy's brother's arrest record for drunk driving on the night of March 23, 1987. According to counsel, it was this "search of the Court Records of Dade County Florida which allowed [them] to determine conclusively for the first time that defendant Victor Levy Cordero was in Miami during the relevant time periods in this case in March of '87." (emphasis added). See Offer of Proof ... docket No.

1004 at 8 n. 4. Ostensibly, it was this recollection of his brother's arrest that led defendant to remember his alleged trip to the NHRA races in March of 1987 thereby placing him out of Puerto Rico at the time of the commission of the offense for which he was charged.

There was, however, something that troubled the Court with respect to these differing versions as to when counsel and defendant allegedly discovered this alibi evidence. For instance:

1. Trial began on Wednesday, November 18, 1992;

2. The first weekend recess allowing for counsel and his client to visit Cesar Castro to confirm the information regarding the red BMW was November 21 and 22, 1992. [FN26]

FN26. The Government's main witness, Angel Rosa-Collazo began his testimony on November 20 and continued testifying on November 23, 24 and 25, 1992. Mr. Moore extensively cross-examined

Angel Rosa-Collazo on November 25, 1992 regarding Cesar Castro's spending habits and inquired specifically as to the latter's purchase of a $70,000.00 red BMW despite the fact that no testimony had been elicited on this particular matter during the direct examination.

3. Miles Johnson testified on November 30 and December 1, 1992. Yet counsel and the defendant had already obtained [FN27] the DUI arrest record by November 20th, 1992. [FN28]

FN27. See Defendant's ... Offer of Proof.... docket No. 1004 at 9, n. 5. If the certified record was obtained on the 20th, we can assume that it was requested from the Dade County Court on or before said date.

FN28. Even though November 20th was the third day of trial, it was the first day of trial testimony. The other two days involved jury selection,

opening statements and arguments regarding motions in limine.

This inconsistency in the timing of counsel's "discovery" of an alibi defense caused the Court great consternation, not only as to the trustworthiness and reliability of the alibi, but also about its purpose and significance [FN29]. Indeed, what most disturbed the Court was the apparent deliberate withholding of this evidence by counsel who, cognizant that he was under a duty to inform the court of this possibility as soon as he began to piece together the alibi evidence and, indeed, could have done so as far back as the beginning of trial, chose instead to ambush the Government and the Court with its disclosure on December 7, 1992, the third week of trial and on the eve of the Government's conclusion of its case in chief.

FN29. In particular, the Court had reservations as to how it had been possible for counsel to obtain the

DUI report on November 20, 1992, before counsel's first "weekend" opportunity to confirm the information which led him to it in the first place.

A good faith gesture by counsel, in compliance with discovery orders and rules, would have alerted the Government in time to be prepared to confront that evidence at trial, keeping the Government from being "sandbagged" [FN30] and not forcing the Court into having to accept defendant's eleventh hour defense, at face value, without sufficient time to investigate the records, documents and witnesses to be offered by this defendant to confirm their reliability.

FN30. Counsel's own description on his purported reliance on the Government's evidence pointing to April instead of March 1987. See December 9, 1992 Trial Transcript p. 43.

It is important to note the considerable

number of witnesses, voluminous records and other evidence proffered by defense counsel in support of his client's whereabouts during March 1987. First, this amount of material could not have possibly been gathered overnight which means that counsel and his client remained silent conveniently waiting for the Government to conclude its presentation of evidence while confirming what they already knew was to be the alibi. Good faith required counsel and defendant to at least alert the Court of their investigation and that way avoid the predicament in which they find themselves at this time.

Further, in order to allow the Government an opportunity to investigate the accuracy of the records and adequately prepare to meet the alibi defense the Court would have been forced to provide an extended interruption of the trial. This is due, first of all, to the numerous witnesses and abundant documentary evidence which must be examined and second, to the fact that part of the

investigation had to take place outside this jurisdiction. [FN31] A continuance would have obviously represented a real risk of mistrial considering this was a well-known case in a relatively small community. [FN32]

FN31. See December 9, 1992 Trial Transcript p. 49.

FN32. A continuance would have also interfered with the other multi- defendant case set for January 11, 1993 which was expected to last several weeks and in which counsel for Forty Estremera was scheduled to appear.

NOTICE OF ALIBI–RULE 12.1

Rule 12.1 of the Fed.R.Crim.P. provides, inter alia, that upon written demand from the Government, the defendant is to serve a notice of his intention to offer an alibi defense. [FN33]

FN33. Where pertinent, Rule 12.1 provides as follows:

(a) Notice by Defendant. Upon written demand of

the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of his intention to offer a defense of alibi....

(b) Disclosure of Information and Witness. Within ten days thereafter, ... the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the name and addresses of the witnesses upon whom the Government intends to rely to establish defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under

subdivision (a) or (b), the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(d) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense....

....

Mr. Moore alleges that all defendants except his client were served with a written demand for alibi notice from the Government and that consequently, he was under no obligation to announce his alibi defense as required by the Rule. Contrary to Mr. Moore's contention, however, the Government served a written demand only upon defendant Forty Estremera, and it did so prior to the consultation with the Court on this issue at the October 8, 1992 Status Conference. In any event, after our Order requiring early notification of any

alibi defense strategy, issued after an extensive discussion with defense counsel in the presence of Mr. Moore, there was no longer any need for the Government to formally present written individual demands for alibi disclosure. This point was obviously clear to the Court and remaining parties and is easily substantiated by the fact that three of the four defendants remaining for trial submitted alibi notices, except Mr. Levy Cordero. [FN34] Accordingly, Mr. Moore's reasoning that he was not required to notify his intention to use an alibi because of the Government's failure to demand it in writing is inapplicable to the factual situation and irrelevant to the reasoning which compelled this Court's exclusion of defendant's alibi evidence.

FN34. It is also apparent that defendant's nondisclosure of an alibi induced the Government to rely on its nonexistence. See December 9, 1992 Trial Transcript p. 218. Consequently, there was no

need for it to specifically and individually demand from Mr. Levy any information relative to a potential alibi defense.

EXCLUSION OF ALIBI EVIDENCE

The courts have outlined through the years several general principles regarding the exclusion of testimony of undisclosed alibi witnesses under Rule 12.1 of the Fed.R.Crim.P. In determining how to exercise its discretionary power to exclude the testimony of undisclosed witnesses under Rule 12.1(d), a district court should consider the amount of prejudice that resulted from the failure to disclose, the reason for nondisclosure, the extent to which the harm caused by nondisclosure was mitigated by subsequent events, the weight of the properly admitted evidence supporting the defendant's guilt, and other relevant factors arising out of the circumstances of the case. United States v. Myers, 550 F.2d 1036 (5th Cir.1977). Rule 12.1 clearly empowers the District Court to exclude

testimony of alibi witnesses for failure to comply with the rule, under the rationale that if the rule is to have any teeth, the trial court must be able to impose sanctions, even such drastic ones as barring alibi witnesses from testifying. Before utilizing the sanction of preclusion, however, the Court must be careful to weigh the interests of the defendant against the public interest of avoiding unwanted surprise and delays at trial. Taylor v. Illinois, 484 U.S. 400, 414-15, 108 S.Ct. 646, 655-56, 98 L.Ed.2d 798 (1988); United States v. Barron, 575 F.2d 752, 757 (9th Cir.1978).

We think the situation before us closely parallels that of Taylor v. Illinois, a case in which the United States Supreme Court considered a state trial judge's refusal to allow a defense witness to testify as a sanction for the defense attorney's failure to identify the witness in response to pretrial discovery requests. In Taylor, defense counsel moved to add two new witnesses on the second day of trial and after the prosecution's principal witness

had testified. He justified the late announcement of this proposed testimony by explaining that he had experienced difficulty in locating the witnesses. However, at a hearing on the matter, it became evident that the defense attorney had visited one of the witnesses [FN35] a week earlier; thereupon the trial judge found that the attorney's conduct constituted a willful violation of the applicable discovery rules and denied defendant Taylor an opportunity to bring the witness' testimony before the jury. The Supreme Court upheld the preclusion of the witness in Taylor. Id. 484 U.S. at 417-18, 108 S.Ct. at 657. The Supreme Court, in discussing the confines of a defendant's constitutional Sixth Amendment right to compulsory process determined that the right, though fundamental, is not absolute:

FN35. The other witness never materialized.

The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments....

Id. at 410-11, 108 S.Ct. at 654.

[Thus, while] a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor, ... the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests.

Id. at 414, 108 S.Ct. at 656. See also United States v. Alvarez, 987 F.2d 77, 83 (1st Cir.1993).

And although it declined to establish a mechanical rule to guide all possible discovery violations, the Court did affirm that, as a general matter, the trial judge must consider: "(1) the integrity of the adversary process, (2) the interest in

the fair and efficient administration of justice, and (3) the potential prejudice to the truth-determining function of the trial process." Chappee v. Vose, 843 F.2d 25, 29 (1st Cir.1988) (citing Taylor, 484 U.S. at 415 n. 19 108 S.Ct. at 656 n. 19). Into this evaluation "the judge should also factor in[ ] ... the nature of the explanation given for the party's failure seasonably to abide by the discovery request, the willfulness vel non of the violation, the relative simplicity of compliance, and whether or not some unfair tactical advantage has been sought." Id. (citing Taylor, 484 U.S. at 413-16 nn. 20-21, 108 S.Ct. at 655-56 nn. 20-21).

Turning now to the case at bar and evaluating it under the light of Taylor, there is no doubt that Mr. Moore's failure to announce the alibi defense earlier as had been ordered by the Court and was his continuing duty so to do, was "willful and motivated by a desire to gain a tactical advantage [to] minimize the effectiveness of [the Government's] cross-examination and the ability to

adduce rebuttal evidence ...". Taylor, 484 U.S. at 415, 108 S.Ct. at 656. Months before trial, from the moment he obtained the discovery package, counsel possessed information from the Government manifesting an "end of March 1987 load". He visited codefendant Cesar Castro to inquire about the latter's purchase of the red BMW on the weekend of November 21-22, 1992. Most notably, he was in possession of the document evidencing his client' brother's arrest record by November 20, the first day of the Government's key witness's testimony. By his own admissions, these were the central pieces of information leading to his client's "sudden" recollection of the alleged trip to the NHRA races in the spring of 1987. It is clear that as in Taylor, defense counsel could have satisfied the applicable discovery rules with ease by notifying the Court and the Government--weeks before he actually did so--of his intention to introduce an alibi defense at trial.

Additionally, as in Taylor, the "truth

determining function" of the trial process was at risk in the situation before us. As stated in Williams v. Florida, 399 U.S. 78, 81, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970), "[g]iven the ease with which an alibi can be fabricated" we became suspicious of the large number of documents, evidence and defense witnesses who had not been identified until after the eleventh hour. Furthermore, despite counsel's characterization of his alibi as being "airtight", [FN36] it appears doubtful that defendant could have convincingly proven his stay in Florida beyond March 23, 1987. [FN37]

FN36. See December 9, 1992 Trial Transcript pp. 42 and 64.

FN37. The only direct piece of evidence referred to by the defendant in his Detailed Proffer ... (docket No. 1004), corroborating his presence in Florida during March of 1987 was a non-refundable round

trip ticket from San Juan to Orlando departing on March 19 and returning to San Juan on March 23, 1987.

We find that Mr. Moore's failure to disclose his intended alibi defense until the eve of the Government's conclusion of the presentation of its evidence, on the third week of trial and after it had lulled the Government into presuming that it would not introduce such a defense was, in our mind, "a deliberate and calculated ploy, prejudicial to the government's litigation stance, and menacing to the very integrity of the adversary process." Chappee 843 F.2d at 32.

Two additional points merit discussion. The first involves Levy's potential involvement in the noncompliance, and whether or not his counsel's deeds should be visited upon him [FN38], an issue that has already been examined by Taylor and its progeny. As plainly stated by the First Circuit Court of Appeals in Chappee,

FN38. It bears mentioning that at Mr. Moore's request, the Court permitted Mr. Levy to reside with counsel in a rented apartment in Isla Verde throughout the duration of the trial and even to travel with him to Miami during week-end recesses because counsel represented to the Court that the continuous assistance of his client was indispensable to the effective preparation of trial. See November 19, 1992 Trial Transcript p. 64.

it has been made clear that lack of complicity between attorney and client ... is of scant significance. Taylor instructs that the client's connivance is not a necessary concomitant to employing a preclusive sanction: "... [T]he lawyer has--and must have--full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval: Moreover, given the protections afforded by the attorney-client privilege and the fact that extreme cases may involve

unscrupulous conduct by both the client and the lawyer, it would be highly impracticable to require an investigation into their responsibilities before applying the sanction of preclusion.... Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client."

Chappee v. Vose, 843 F.2d at 29 (quoting Taylor v. Illinois, 484 U.S. at 418, 108 S.Ct. at 657); see also United States v. Johnson, 970 F.2d 907, 911 (D.C.Cir.1992) ("Taylor expressly holds that exclusion may be applied against a defendant who was not personally involved in his counsel's misconduct.")

Secondly, even if we were to assume that counsel's failure to timely disclose his alibi defense, was not "willful", Taylor has been interpreted as not establishing such an absolute requirement. Thus, as one circuit recently opined:

We think any requirement of bad faith as an absolute condition to exclusion would be

inconsistent with the Taylor Court's reference to trial court discretion and its extended discussion of the relevant factors ...

United States v. Johnson, 970 F.2d at 911. Other circuits have read Taylor as establishing a balancing test in which bad faith is one of the relevant factors, albeit a powerful one, to be considered before exclusion. See e.g., Chappee 843 F.2d at 29-32; Eckert v. Tansy, 936 F.2d 444, 446 (9th Cir. 1991).

Applying this balancing test we determined that allowing Levy Cordero to go forward with his alibi defense thereby forcing a continuance of the trial on December 7th, would have signified the loss of significant resources, disrupting an extremely taut trial schedule and risked holding a jury in a relatively well-known criminal trial over an extended period of delay. All, of course, requiring largely new preparation when the case was again set for trial. These consequences are significant in the administration of justice and are to be avoided if at all possible after full

consideration of the relevant factors set forth in Taylor and Chappee.

CONTINUING DUTY TO DISCLOSE--RULE 16(c)

Notwithstanding the requirements imposed by Rule 12.1, counsel was under a continuing duty to promptly notify the Government and the Court of the existence on any newly discovered evidence pursuant to Rule 16(c) of the Fed.R.Crim.P. [FN39] Under Rule 16, the defendant's duty to disclose is not triggered until the Government complies with the defendant's request for documents and tangible objects or examination and tests reports. [FN40] Once the Government has complied, it can request and is entitled to discover documents and tangible objects in defendant's possession or control that the defendant intends to introduce as evidence in its case in chief at trial. The defendant assumes a continuing duty to disclose any newly discovered information that satisfies the Government's request. Indeed, the Court may sanction the defendant for failure to comply with this duty. See

Rule 16(d)(2) Fed.R.Crim.P.

FN39. Rule 16(c) provides as follows:
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.
(emphasis added)

FN40. In the case before us, two master discovery motions were filed by Lead Counsel in representation of all defendants. See Master Discovery Motions ..., docket Nos. 226A and 568, filed on November 7, 1991 and May 20, 1992, respectively, after which an inspection of the Government's physical evidence was held on June 6, 1992. See also Government's Response to Master Discovery Motions, docket Nos. 263 and 591, filed

on December 3, 1991, and June 9, 1992, respectively. Pursuant to Rule 16(b), the Government's request for reciprocal discovery, docket No 770, was filed on August 21, 1992.

In the situation before us, it is evident that information in defense counsel's possession as far back as November 20, 1992, which information allegedly set off the "sudden" recollection of his client's purported trip to the NHRA races in March of 1987, and which counsel sought to belatedly present as part of an alibi defense, fell squarely within the parameters of the reciprocal discovery rule, and as such, its exclusion for failure to promptly notify the Court or the Government of its existence was warranted. See United States v. King, 703 F.2d 119, 126 (5th Cir.1983) (exclusion of document supporting alibi defense on basis that defendant failed to provide reciprocal discovery is not abuse of discretion even though government had not made written demand for notice of alibi defense).

CONCLUSION

After consideration of all the relevant factors, allowing defendant's eleventh hour request to present an alibi defense would have been prejudicial to the Government, deleterious to the integrity of the adversary process and detrimental to the administration of justice.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1679

UNITED STATES,

Appellee,

v.

VICTOR-LEVY-CORDERO,

Defendant - Appellant.

No. 93-2015

UNITED STATES,

Appellee,

v.

WILLIAM ROMERO-LEWIS,
A/K/A CACO, EL TENIENTE,

Defendant- Appellant.

No. 93-2087

UNITED STATES,

Appellee,

v.

JOSE SAMUEL FORTY-ESTREMERA,

a/k/a SAMMY,

Defendant - Appellant.

Before

Torruella, Chief Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

Jeffrey S. Weiner, with whom Molly Ebelhare and Jeffrey S. Weiner, P.A., Attorneys at Law, were on brief, for appellant Victor Levy-Cordero.

Carlos E. Geigel, for appellant William Romero-Lewis.

Frank D. Inserni, by Appointment of the Court, for appellant Jose Samuel Forty-Estremera.

Lena Mitchell, Attorney, Criminal Division, Narcotic and Dangerous Drug Section, Department of Justice, with whom Jo Ann Harris, Assistant Attorney General, Theresa M.B. Van Vliet, Chief, Criminal Division, and Guillermo Gil, United States Attorney, were on brief for appellee.

October 16, 1995

TORRUELLA, Chief Judge. Appellants were among thirty-nine defendants charged in a

thirty-nine count superseding indictment. All three appellants appeal their convictions for conspiracy to possess with intent to distribute more than 10,000 kilograms of cocaine and more than 1,000 kilograms of marijuana. In addition, they appeal their convictions on various drug trafficking and drug possession charges. For the reasons stated herein, we affirm the convictions of appellants Jose Samuel Forty-Estremera and William Romero-Lewis. We remand the case of appellant Victor Levy-Cordero for further findings in accordance with this opinion.

BACKGROUND

The facts as the jury could have found them are as follows. Angel Rosa-Collazo ("Rosa-Collazo") and Jesus Manuel Forty-Estremera ("Manolo Forty"), who is the brother of appellant Jose Samuel Forty-Estremera ("Forty-Estremera"), were the leaders of a large conspiracy to import and distribute marijuana and cocaine in Puerto Rico between March 1987 and November 1990.

[FN1] In early 1987, Rosa-Collazo, Manolo Forty, Forty-Estremera, and a co-conspirator named Cesar Castro-Gomez ("Castro-Gomez"), agreed to import a load of marijuana from Colombia to Puerto Rico. Rosa-Collazo arranged for a Colombian supplier to provide the marijuana. Castro-Gomez recruited appellant Victor Levy-Cordero ("Levy-Cordero"), who owned a boat that could be used to off-load the marijuana from the Colombian mothership. On March 7, 1987, Forty-Estremera and other co-conspirators rented a house near Naguabo, Puerto Rico for stashing the drugs. Over the course of three days, sometime in the weeks following the rental of the stash house, [FN2] various members of the conspiracy, including Levy-Cordero, Castro-Gomez, and Manolo Forty, off-loaded 5,000 pounds of marijuana from the Colombian ship and brought it to the beach near the stash house. Forty-Estremera helped supervise a crew of about eight men who took the marijuana from the beach to the stash house. Forty-Estremera was responsible

for paying the men.

FN1. Rosa-Collazo, who was living in Florida as a fugitive from justice during the pendency of the conspiracy, entered into a plea agreement with the government and was the central witness against appellants in this case. He pled guilty to operating a continuing criminal enterprise, in violation of 21 U.S.C. § 848, and was sentenced to 12 years in prison. Manolo Forty, also charged with operating a continuing criminal enterprise, is a fugitive from justice.

FN2. The exact date of the marijuana importation was a subject of dispute at trial, and continues as such on appeal. See infra.

In April 1988, Rosa-Collazo coordinated the importation of approximately 5,000 pounds of marijuana from Colombia. Forty-Estremera supervised a crew of men off-loading the marijuana on the beach near Humacao, Puerto

Rico. The marijuana was then transported to and stashed at the home of co-conspirator Miles Johnson ("Johnson"). [FN3] The marijuana was then distributed from Johnson's home.

FN3. Johnson entered a plea agreement and testified at trial for the government. He testified that his friend Forty-Estremera, along with Rosa-Collazo, approached him about using his house to stash the drugs.

In May 1988, Rosa-Collazo and Manolo Forty directed several co-conspirators in the importation of approximately 300 kilograms of cocaine from Colombia to Puerto Rico. Rosa-Collazo paid Forty-Estremera $60,000 to store the cocaine at his home for several hours. The conspirators imported two more loads of cocaine in September 1988, one load in October 1988, one load in November 1988, a load in March 1989, another in April 1989, three loads in May 1989, and one load in November 1990.

In addition, there were unsuccessful attempts to import cocaine in September 1988 and March 30, 1990. In total, the conspiracy imported over 7,000 kilograms of cocaine during this period.

The cocaine was usually imported from Colombia. The operating procedure, which varied only slightly, was as follows. Rosa-Collazo would speak to his mostly Colombian suppliers via radio and arrange the logistics of the transactions. A group of co-conspirators, usually led by Manolo Forty, would either meet a Colombian mothership at sea or pick up cocaine dropped from a plane, and load the cocaine onto small boats. They would then bring the load of cocaine near the shore, where it would be transferred to a small raft and brought to the beach. A group of co-conspirators, usually supervised by Forty- Estremera, would be waiting on the beach to off-load the cocaine and transport it by car or truck to a pre-arranged stash house. The cocaine was occasionally stored at the homes of Johnson or Forty-Estremera. The cocaine would

then be distributed from the stash house. Members of the conspiracy were paid in cash or cocaine.

After a twenty-day trial, Forty-Estremera was convicted of one count of conspiracy, two counts of importing marijuana, two counts of possessing marijuana with intent to distribute, ten counts of importing cocaine, ten counts of possessing cocaine with intent to distribute, and one count of attempting to import cocaine. Romero-Lewis was convicted of one count of conspiracy, two counts of importing cocaine, two counts of possessing cocaine with intent to distribute, and one count of attempting to import cocaine. Levy-Cordero was convicted of one count of conspiracy, one count of importing marijuana, and one count of possessing marijuana with intent to distribute. [FN4]

FN4. Forty-Estremera was sentenced to concurrent terms of life imprisonment for each count of conviction. Romero-Lewis was sentenced to concurrent twenty-year terms of imprisonment for

each count of conviction. Levy-Cordero was sentenced to concurrent twenty-year terms of imprisonment for each count of conviction.

DISCUSSION

Appellants challenge their convictions on several grounds. We address these issues seriatim.

I. Severance

Romero-Lewis and Levy-Cordero argue that the district court abused its discretion in refusing to grant their motions, pursuant to Fed.R.Crim.P. 14, to sever their respective trials from that of Forty-Estremera. We begin our analysis of this issue with the maxim that persons who are indicted together should generally be tried together. See United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir.1993) (citations omitted). "We reverse the decision to deny a motion for severance only upon a showing of strong prejudice, demonstrating a manifest abuse of discretion that deprived the defendant of a fair trial." United States v. DeMasi,

40 F.3d 1306, 1312 (1st Cir.1994) (quoting United States v. Nason, 9 F.3d 155, 158 (1st Cir.1993), cert. denied, 510 U.S. 1207, 114 S.Ct. 1331, 127 L.Ed.2d 678 (1994)). [FN5] When severance is denied, appellants bear the burden of proving "prejudice greater than that which necessarily inheres whenever multiple defendants ... are jointly tried." United States v. Diallo, 29 F.3d 23, 27 (1st Cir.1994) (quoting United States v. Walker, 706 F.2d 28, 30 (1st Cir.1983)). In this context, "prejudice means more than just a better chance of acquittal at a separate trial." Id. (quoting United States v. Boylan, 898 F.2d 230, 246 (1st Cir.), cert. denied, 498 U.S. 849, 111 S.Ct. 139, 112 L.Ed.2d 106 (1990)).

FN5. This extremely deferential standard of review follows from the Supreme Court's recent admonishment that "a district court should grant a severance motion under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or

prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, ----, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993).

Romero-Lewis and Levy-Cordero contend that they were prejudiced by the volume of evidence presented against Forty-Estremera. Romero-Lewis notes that the government alleged only that he served as a boat captain in two shipments of cocaine. He contends that the evidence of his co-conspirators importing and distributing marijuana and cocaine in a similar manner prevented the jury from considering the evidence against him independently. He also contends that this prejudice was compounded by the district court's decision to allow evidence of his co-conspirators' participation in unrelated drug trafficking pursuant to Fed.R.Evid. 404(b). Similarly, Levy-Cordero argues that a "minuscule" percentage of the total evidence presented in the

case related to him. He also argues that admission of Rule 404(b) evidence relating to him "further contributed to the blending of the issues and the danger that the jury would not sort through the evidence properly."

It is true that much of the evidence in this case was directed primarily at Forty-Estremera, but this factor alone is not grounds for reversal. As we have explained, the mere fact that a "minnow" stands trial with a "kingfish," and the government aims most of its ammunition at the kingfish, does not, without more, necessitate separate trials. O'Bryant, 998 F.2d at 26. "It is well settled that '[e]ven where large amounts of testimony are irrelevant to one defendant, or where one defendant's involvement in an overall agreement is far less than the involvement of others,' the court of appeals must be 'reluctant to second guess severance denials.' " DeMasi, 40 F.3d at 1313 (quoting O'Bryant, 998 F.2d at 26).

Moreover, the indictment alleged that all

three appellants were members of the four-year conspiracy to import drugs. The majority of the evidence introduced against Forty-Estremera to establish the conspiracy, therefore, would have been admissible in separate trials against Romero-Lewis and Levy-Cordero to establish the existence of the conspiracy. As we have previously explained, "[w]here evidence featuring one defendant is independently admissible against a codefendant, the latter cannot convincingly complain of an improper spillover effect." O'Bryant, 998 F.2d at 26 (collecting cases). We also note that the trial judge in this case gave appropriate limiting instructions concerning the admissibility of evidence against particular defendants, and the need to determine guilt on an individual basis.

To prevail on a claim of prejudicial spillover, a defendant "must prove prejudice so pervasive that a miscarriage of justice looms." United States v. Pierro, 32 F.3d 611, 615 (1st Cir.1994) (citations

omitted). Because neither Romero-Lewis nor Levy-Cordero have satisfied this burden, we affirm the denial of their respective motions to sever.

II. Prosecutorial Misconduct

All three appellants argue that certain comments made by the prosecutor during closing argument denied them their rights to a fair trial. The prosecutor made the following remarks near the end of the government's closing argument:

> Ladies and gentlemen, I used to sing a hymn when I was growing up that was--came from, I believe, Russell Lowe, and it goes something like: Once to every man in nation comes the moment to decide on the side of the truth or falsehood. On the good or evil side.
>
> I submit to you all thirty-nine of these Counts--all three of these defendants agreed to take part of the conspiracy to smuggle drugs into Puerto Rico show

> the evil. And I submit to you that when the defendants pled guilty and decided to cooperate and come in here and tell you ladies and gentlemen what happened, those cooperating defendants for the first time decided to tell the truth and they showed to the side of the truth.

These remarks were obviously improper. First, they constitute improper witness-vouching by the prosecution. See United States v. Manning, 23 F.3d 570, 573 (1st Cir.1994) (improper for prosecutor to vouch for credibility of government witness) (collecting cases). Second, by conjuring up images of religion, the remarks improperly appeal to the jury to act in ways other than as dispassionate arbiters of the facts. See Id. See also Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir.1993); United States v. Giry, 818 F.2d 120, 133 (1st Cir.1987). We will reverse a conviction on the grounds of a prosecutor's improper jury argument,

however, only if we find that the prosecutor's remarks were both inappropriate and harmful. See United States v. Ovalle-Marquez, 36 F.3d 212, 220 (1st Cir.1994) (citing United States v. Young, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 1044-45, 84 L.Ed.2d 1 (1985)). [FN6] We must therefore determine whether these improper remarks were harmful.

FN6. The parties agreed, prior to trial, that they would not object during opening and closing arguments. Counsel for Levy-Cordero moved for a mistrial based on the prosecutor's remarks immediately after the government's closing argument. Counsel for the other appellants joined in that motion. Under these circumstances, the issue is properly preserved for appeal.

Improper statements during closing argument are considered harmful if, under the totality of the circumstances, they likely affected the trial's outcome. See Manning, 23 F.3d at 574;

United States v. Hodge-Balwing, 952 F.2d 607, 610 (1st Cir.1991); United States v. Capone, 683 F.2d 582, 586-87 (1st Cir.1982). In making this determination, we focus particular attention on (1) the severity of the misconduct; (2) whether it was deliberate or accidental; (3) the context in which it occurred; (4) the likely effect of any curative instructions; and (5) the strength of the evidence against the defendant. Manning, 23 F.3d at 574; United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir.1993).

In this case, the relevant factors cut both ways. Several factors weigh towards a finding of harmfulness. First, the remarks were plainly deliberate-- most likely they were part of a scripted argument prepared in advance by the prosecutor. Second, the improper argument was made at the very end of the government's summation. As we have previously observed, this is "an especially delicate point in the trial process [because it] represent[s] the parties' last, best chance to marshal the evidence and persuade the jurors of its import."

United States v. Taylor, 54 F.3d 967, 977 (1st Cir.1995). Finally, the court did not provide a curative instruction to mitigate the impact of the improper comments. [FN7]

FN7. We note that the motion for mistrial and request for a curative instruction, and the court's denial of both, took place outside the presence of the jury. Thus, the improper remarks were not tacitly approved by the judge in front of the jury. Cf. Manning, 23 F.3d at 575 (district court tacitly indicated that the prosecutor's improper arguments were proper by overruling defense counsel's contemporaneous objections).

We think those factors are outweighed, however, by those militating against a finding of harmfulness. First, our review of the record indicates that this was an isolated incident of misconduct during the course of a twenty day trial. Cf. Manning, 23 F.3d at 575 (prosecutorial

overreaching was "pervasive"). Second, we do not think that these isolated remarks were particularly persuasive, and they were not delivered in a particularly artful manner. While we think the remarks were intended to appeal to the jurors' passions and emotions, we do not think they were of a caliber that would inherently compel jurors to disregard their duty. Cf. United States v. Machor, 879 F.2d 945, 955-56 (1st Cir.1989) (affirming drug convictions where prosecutor appealed to jury to convict because, among other improper reasons, drugs are "poisoning our community, and our kids die because of this"). Third, we think the evidence against the appellants was sufficiently strong that these isolated, and relatively tame remarks would not likely affect the outcome of the case. Cf. United States v. Sepulveda, 15 F.3d 1161, 1188 (1st Cir.1993) (considering the strength of the evidence, improbable that "isolated, relatively subdued appeal for law enforcement" affected outcome of trial). Finally, we note that, although the court did not

provide an explicit curative instruction, its instructions to the jury at the close of argument were strong and clear. The court instructed the jury that "it is your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy." The court also stated that "any statements, objections or arguments made by the lawyers are not evidence in the case" and that "[y]ou are the sole judges of the credibility or believability of each witness." With respect to the testimony of the codefendants who reached plea agreements with the government, the court stated: "[Y]ou should keep in mind that such testimony is always to be received with great caution and weighed with great care. You never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that accomplice's testimony beyond a reasonable doubt...." The court also provided clear and comprehensive instructions concerning the separate elements of conspiracy. On balance, we

think these instructions likely mitigated any impact the prosecutor's improper remarks might have had. Cf. Giry, 818 F.2d at 133 (noting that similar instructions "significantly reduced the prejudicial impact of the prosecutor's misstatements").

For the foregoing reasons, we conclude that the improper remarks were not so prejudicial as to require reversal. Notwithstanding our decision in this regard, we repeat our concern that, "after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk." United States v. Ortiz-Arrigoitia, 996 F.2d 436, 441 (1st Cir.1993) (collecting cases). See, e.g., Udechukwu, 11 F.3d 1101; Arrieta-Agressot, 3 F.3d 525. When, as in this case, a visiting Justice Department prosecutor conducts the trial, we nevertheless expect the resident United States Attorney to insure that the expectations of the court concerning closing argument be made known.

III. The Rule 404(b) Evidence

Forty-Estremera and Levy-Cordero both challenge the admission, pursuant to Fed.R.Evid. 404(b), of certain evidence against them at trial. Under Rule 404(b), evidence of a defendant's prior bad acts is not admissible if the only relevance of the evidence is to "instigate an inference that the defendant is more likely to have acted in similar fashion by committing the offense for which he is on trial." United States v. Tutiven, 40 F.3d 1, 5 (1st Cir.1994). Although prior bad act evidence is inadmissible if it only shows bad character or propensity to commit a crime, it may be admitted if it tends to prove, among other things, the defendant's motive, intent, knowledge or plan with respect to the crime at issue, and its probative value is not substantially outweighed by the danger of unfair prejudice. See United States v. Cassiere, 4 F.3d 1006, 1021 (1st Cir.1993) (citations omitted); United States v. Arias-Montoya, 967 F.2d 708, 709 (1st Cir.1992).

A. Forty-Estremera's Prior Drug Trafficking

On cross-examination, counsel for Levy-Cordero asked cooperating co- conspirator Frank Martone a series of questions about his admitted involvement in flying drugs into Puerto Rico in the early 1980s. After counsel asked Martone if he ever used a co-pilot, and Martone answered in the affirmative, the following colloquy ensued.

COUNSEL: How many co-pilots did you have with the Rosa gang? Give me a number first.

MARTONE: Three.

COUNSEL: I bet you're going to say Sammy Forty [Estremera] was one of them aren't you?

MARTONE: Sammy flew with me about three or four times.

Counsel for Forty-Estremera neither objected to this testimony nor requested a limiting instruction.

The prosecutor returned to this issue on redirect, asking Martone how many trips Forty-Estremera made as his co-pilot. Counsel for Forty-Estremera

objected on relevancy grounds and the district court overruled his objection. The prosecutor then elicited from Martone that Forty-Estremera flew as his co- pilot three times to Colombia and once to Jamaica for the purposes of importing marijuana to Puerto Rico. Martone also testified that the marijuana was usually airdropped to waiting boats, and one time it was off-loaded on Virgin Gorda. He also testified that he and Forty-Estremera were paid to transport the drugs. Forty-Estremera now challenges the admission of this testimony.

Under the circumstances of this case, we need not decide whether the district court erred in allowing Martone to testify about Forty-Estremera's prior drug trafficking activities because we conclude that, even assuming that the court erred, any such error was harmless. Arias-Montoya, 967 F.2d at 714; Fed.R.Crim.P. 52 (any error which does not "affect substantial rights shall be disregarded").

We treat nonconstitutional evidentiary errors under Rule 404(b) as harmless if we conclude

that it is "highly probable" that the error did not contribute to the verdict. Arias-Montoya, 967 F.2d at 714 (quoting United States v. Garcia-Rosa, 876 F.2d 209, 221 (1st Cir.1989)). We think it highly unlikely that Martone's testimony on cross-examination affected the verdict. First of all, we note that the government's main witness, cooperating co-conspirator Rosa-Collazo, had already alluded generally to the fact that he and Forty-Estremera had long been involved in drug smuggling. [FN8] The fact that the jury had already heard about Forty-Estremera's alleged prior drug trafficking activities, without any objection, decreases the chances that the improper admission of Martone's statement caused much additional prejudice. Considering what the jury had already heard about Forty-Estremera, Martone's testimony must have come as no surprise. Second, as described herein, the government's case against Forty-Estremera, independent of the bad act evidence, was very strong. We therefore conclude

that admission of that testimony on cross-examination was harmless.

FN8. For example, Rosa-Collazo testified: "And eventually [Forty- Estremera] came forward to me and told me that they were broke, since we been two years since we haven't work and didn't make money in drugs, you know, making drug deals, in smuggling drugs like we used to, and that we needed to get together to see if we can make any other load or some kind of business again."

The above analysis applies with equal force to the testimony elicited on re-direct by the government. In addition, we note that, because the prejudicial testimony in question had already been elicited by counsel for Levy-Cordero, without objection from Forty-Estremera, the cat was already substantially out of the bag. Moreover, the few additional details elicited from the prosecutor were not particularly prejudicial in and of themselves. The most significant information was provided on

cross-examination--that Forty- Estremera had previously been involved in drug trafficking. [FN9]

FN9. Our decision that admission of this evidence was harmless moots Forty-Estremera's argument that the evidence should have been excluded because the government's intention to use such Rule 404(b) evidence was lately notified to defense counsel.

B. Levy-Cordero's False Identification Documents

Levy-Cordero argues that the district court erred in admitting into evidence, pursuant Rule 404(b), a false passport and social security card seized from him at the time of his arrest in June 1992. Prior to Levy-Cordero's arrest, a Special Agent of the Drug Enforcement Agency had a secretary telephone Levy- Cordero, identify herself as the office manager of his apartment, and inform him that the police were coming that day to arrest him. Immediately after the call was made, Levy-Cordero emerged from his apartment with a briefcase

containing a false passport, false social security card, a pager, cellular telephone, $1,200 in cash, and other documents. Although Levy-Cordero did not object at trial to the admission of evidence that he fled when notified of his impending arrest, he objected to admission of the items in the brief case. On appeal, he challenges only admission of the fake passport and social security card.

After a hearing, the district court ruled that "the passport [was] relevant and probative to the issue of the defendant's consciousness of guilt and, therefore, admissible under Rule 404(b)." Levy-Cordero requested a limiting instruction that the documents were being admitted solely on the issue of consciousness of guilt. The court agreed to give such an instruction, but instead informed the jury that it could consider the evidence "only for the limited purpose of showing whether [Levy] had the required intent or knowledge to commit the offense charged in this case."

We think the evidence in question was

properly admissible under Rule 404(b) to show consciousness of guilt, but that the court erred in instructing the jury that it could be used to show appellant's intent or knowledge of the charged offenses. We conclude, however, that the erroneous limiting instruction was harmless. Indeed, we think the error was more favorable to the defendant than a consciousness of guilt instruction. This is so because there is no logical reason why possession of a false passport and social security card in 1992 would demonstrate appellant's intent or knowledge with respect to drug trafficking offenses in 1987. Thus, the court instructed the jury that it could draw an inference that the evidence could not logically support. In contrast, the evidence does logically support an inference of consciousness of guilt. Under such circumstances, we find no error in the admission of the false identification evidence, and conclude that the erroneous limiting instruction was harmless.

IV. Exclusion of Alibi Evidence

A. Levy-Cordero

Levy-Cordero argues that his Sixth Amendment right to present witnesses in his defense was violated when the district court denied his mid-trial, emergency motion to present alibi evidence. The district court excluded the proffered alibi evidence as a sanction for what it described as defense counsel's willful violation of the court's discovery order requiring pre-trial notice of intent to offer an alibi defense.

The facts and allegations relevant to this issue are as follows. The indictment alleges that Levy-Cordero was involved in the importation of a 5,000-pound load of marijuana which arrived in Puerto Rico "[d]uring several days in March or April of 1987." The government provided defense counsel with a letter prior to trial stating that "the load of marijuana was imported into Puerto Rico three weeks after the co-conspirators were in possession of the [stash] house." The government

indicated that the stash house was rented between March 7th and 10th, but was unclear as to when the co- conspirators actually took possession. In addition, in response to inquiries from defense counsel, the government indicated, at one point, that the load arrived at "the end of March 1987," and, at another point, that it arrived no earlier than March 22 or 24, 1987.

On November 20, 1992, the government's first witness at trial, Rosa-Collazo, testified that the load arrived three weeks after the rental of the stash house by the co-conspirators. On November 30, 1992, co-conspirator Johnson testified that the load arrived a "week or two" after the house was rented, and that it was off-loaded over the course of a Friday, Saturday and Sunday. On December 1, the owner of the rental house, Julia Toro-May ("Toro-May") testified that the house was rented on March 7, 1987, and that she mailed the keys to the house on March 8th (a Sunday).

Levy-Cordero maintains that the testimony

of Johnson and Toro-May suggests a new time frame for the arrival of the marijuana at the stash house. He argues that the load could have arrived on the weekends of March 13-15, 1987, [FN10] or March 20-22, 1987, which are earlier than the dates indicated by the government before trial. Levy-Cordero maintains that after he heard this testimony he began to "piece together his memory regarding his whereabouts five years earlier," and eventually recalled that he had made a trip to Gainesville, Florida to attend the National Hot Rod Association Gator Nationals car races during the weekend of March 20-22, 1987. He also remembered that co-defendant Castro-Gomez had purchased a new BMW in Florida that same weekend. Levy-Cordero's counsel visited Castro-Gomez in prison to confirm the dates that he travelled to Florida to purchase the car. Levy-Cordero also recalled that, although he was scheduled to return to Puerto Rico on March 23, he stayed in Miami because his brother was arrested for driving under the

influence of alcohol, and he did not return to Puerto Rico until the 28th or 29th of March.

FN10. The jury implicitly rejected these three dates as the possible dates of the importation by rejecting appellant's claim that the statute of limitations had run on the offenses charged in the superseding indictment. Any acts prior to March 20, 1987, would have been beyond the statute of limitations.

Levy-Cordero's counsel notified the court on December 3, 1992, that he was investigating a possible alibi defense. On December 7, 1992, Levy-Cordero filed an emergency motion to present alibi evidence that he was in Florida from March 19, 1987 through March 28-29, 1987, and therefore could not have assisted in the importation of the marijuana in Puerto Rico. In support of his alibi defense, Levy-Cordero listed six witnesses and extensive documentary evidence, including travel agency records, bank card charge records,

photographs, his brother's arrest record, and Castro-Gomez' car purchase records. After a hearing, the district court denied the motion to present alibi evidence. The district court concluded that counsel's failure to disclose the alibi defense earlier was "willful and motivated by a desire to gain a tactical advantage" at trial. United States v. Levy-Cordero, 833 F.Supp. 938, 945 (D.P.R.1993) (quoting Taylor v. Illinois, 484 U.S. 400, 415, 108 S.Ct. 646, 656, 98 L.Ed.2d 798 (1988)). The court excluded the alibi evidence as a sanction for counsel's deliberate violation of a court discovery order.

Levy-Cordero argues that exclusion of the alibi evidence violated his Sixth Amendment right to present witnesses in his favor. The Compulsory Process Clause of the Sixth Amendment guarantees every defendant "the right ... to have compulsory process for obtaining witnesses in his favor...." The clause thus provides criminal defendants the right to present witnesses and evidence in their defense.

See Taylor, 484 U.S. at 408, 108 S.Ct. at 652- 53; Chappee v. Vose, 843 F.2d 25, 28 (1st Cir.1988). Although this right is fundamental, it is not absolute, and must be weighed against countervailing public interests. Taylor, 484 U.S. at 414, 108 S.Ct. at 655- 56. The factors to consider in the balance include the "integrity of the adversary process, which depends both upon the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth- determining function of the trial process." Id. at 414-15, 108 S.Ct. at 656. The trial court can properly exclude alibi testimony if these factors outweigh the defendant's interest in presenting the testimony. Bowling v. Vose, 3 F.3d 559, 561 (1st Cir.1993), cert. denied, 510 U.S. 1185, 114 S.Ct. 1236, 127 L.Ed.2d 580 (1994). Moreover, if the court determines that counsel's delay in providing timely notice of an alibi defense "was willful and motivated by a desire to obtain a tactical advantage

that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence," exclusion is "entirely consistent" with the purposes of the Compulsory Process Clause. Taylor, 484 U.S. at 415, 108 S.Ct. at 656.

Application of the Taylor factors is a legal question which we review de novo. Bowling, 3 F.3d at 561 n. 4. The district court's specific finding of willfulness, however, is more akin to a finding of fact than a legal conclusion. The determination depends primarily on whether the district court accepts or rejects counsel's explanation as to why he could not provide notice of the alibi defense in a timely manner. See Taylor, 484 U.S. at 415, 108 S.Ct. at 656 (trial judge may insist on and evaluate party's explanation for its failure to provide timely notice of alibi defense). The decision therefore hinges upon whether that explanation is credible, given the surrounding factual circumstances of the case. Such a factual determination merits considerable deference. Nevertheless, after carefully reviewing

the record, we conclude that the district court's decision lacks record support.

The district court relied on the following factors in support of its conclusion that counsel's failure to provide notice of an alibi defense in a more timely fashion was a willful attempt to gain tactical advantage at trial. First, the court noted that, when first asked why he did not investigate an alibi for March before trial, counsel for Levy-Cordero stated that he was misled by the government to believe that the alleged importation took place in April. The court rejected this explanation, noting that the government's response to counsel's motion for bill of particulars stated that the importation took place "[n]o earlier than March 22 ... or March 24, 1987," and that counsel had a copy of a letter the government sent to Castro-Gomez' counsel prior to trial stating that the load arrived "at the end of March 1987." [FN11]

FN11. This letter also states that the load came in

three weeks after the co-conspirators took possession of the stash house. The evidence indicates that they took possession of the stash house at least a few days after March 8. Three weeks after March 10th is April 1st. Thus, the letter actually contains two contradictory statements.

The court is certainly correct that these letters put counsel on notice to investigate any possible alibi defense for later than March 22. The fact remains, however, that the dates provided by the government exclude the possibility that the drugs were imported on the weekend of March 20-22--precisely the dates that the jury could have concluded the drugs arrived in Puerto Rico if they believed Johnson's testimony. Although counsel's statement that the government "misled" him into believing the marijuana was imported in April 1987 is not supported by the record, we discern no malicious intent from the statement. The fact is that the time frame provided by the government

prior to trial was changed at trial by the testimony of a government witness, Johnson. Cf. Bowling, 3 F.3d at 560.

Defense counsel was entitled to rely on the government's representations prior to trial, particularly in light of the fact that the allegations in the superseding indictment occurred more than five years prior to appellant's arrest, making investigation of a possible alibi exceedingly difficult. In Bowling, we concluded that counsel's failure to investigate an alibi for a time which was expressly excluded by the government's time frame before trial, although it was close in proximity to that time frame, was "negligence at worst." 3 F.3d at 562. On balance, we think the facts of this case are much closer to Bowling than they are to Taylor, the case relied on by the district court, where the evidence indicated that counsel had interviewed an exculpatory witness a week before trial and flat-out lied in telling the court that he had just discovered the witness. See Taylor, 484 U.S. at 416-17, 108 S.Ct.

at 656-57.

Second, the district court pointed out several apparent contradictions in counsel's chronology of the events leading to the discovery of the alibi. These contradictions are fully delineated in the district court opinion, 833 F.Supp. at 942-43, and will not be repeated here. The court concluded from these contradictions that counsel was investigating the potential alibi defense as early as November 20, 1992. Noting counsel's duty to immediately inform the court of the possibility that it might present an alibi defense, the court concluded that counsel's failure to do so represented a deliberate ploy to ambush the government. Id. at 946.

We think there are two problems with this conclusion. First, counsel was providing the government, if not the court, with all documentation and subpoena information with respect to its possible alibi investigation as that evidence was received. Second, and most

importantly, we do not think the record is clear with respect to whether counsel was ever ordered to provide notice of its intention to present an alibi defense. As to this latter point, some background is necessary.

A defendant's duty to provide notice of an alibi defense is triggered when the government issues a written demand pursuant to Rule 12.1(a) of the Federal Rules of Criminal Procedure. [FN12] In its initial opinion denying Levy- Cordero's emergency motion to present alibi evidence, the court mistakenly ruled that Levy-Cordero had not complied with Rule 12.1(a). In fact, the government never issued a Rule 12.1(a) demand to Levy-Cordero. After counsel informed the court of this fact, the court ruled that Levy-Cordero had failed to comply with the court's October 15, 1987, discovery order ("Omnibus Order No. 7").

FN12. Rule 12.1(a) provides: "Upon written demand by the attorney for the government stating

the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such time as the court may direct, upon the attorney for the government a written notice of intention of the defendant's intention to offer a defense of alibi."

Omnibus Order No. 7 provides: "[A]ll those defendants intending to offer an alibi defense shall serve the Rule 12.1(a) Fed.R.Crim.P. Notice of Alibi upon the Government no later than October 26, 1992. The Government's disclosure pursuant to Rule 12.1(b) ... shall be served upon defendants no later than November 10, 1992." Prior to this order, the government had issued Rule 12.1(a) written demands for notice of alibi defenses to two of the defendants in this case, but not to Levy-Cordero. At the hearing on October 15, those defendants requested an extension of the ten days required under Rule 12.1 to respond to the written demand. Counsel for Levy-Cordero did not participate in the

ensuing discussion because the government had not served a written demand upon his client. The district court's order specifically refers to "the Rule 12.1(a) ... Notice of Alibi." On its face, this order refers only to those defendants who have already received a written demand from the government, and appears to be in direct response to the request for an extension to respond to the written demand. Under these circumstances, we think counsel's conclusion that he was not required to immediately disclose the fact that he was investigating a possible alibi defense was not wholly unreasonable.

The district court's balancing of the remaining Taylor factors depended almost entirely on its predicate willfulness finding. We have weighed the Taylor factors in light of our determination that counsel did not engage in willful misconduct, and conclude that appellant's Sixth Amendment right to present witnesses in his defense outweigh those concerns. Specifically, we note that neither the integrity of the adversary

process nor its truth-seeking function is threatened by introduction of the alibi evidence. The court made no specific findings with respect to the reliability of the proposed alibi evidence. Rather, the court simply stated that " '[g]iven the ease with which an alibi can be fabricated' we became suspicious of the large number of documents, evidence and defense witnesses who had not been identified until after the eleventh hour." 833 F.Supp. at 946 (quoting Williams v. Florida, 399 U.S. 78, 81, 90 S.Ct. 1893, 1895-96, 26 L.Ed.2d 446 (1970)). The district court provides no justification, however, for its conclusion that the " 'truth-determining function' of the trial process was at risk." Id. While a court may rightfully become suspicious where an "eleventh hour" alibi is so thoroughly documented, it cannot, without more, simply conclude that the alibi was therefore fabricated. [FN13] In this respect, we note that the district court states that the only piece of "direct evidence" corroborating defendant's presence in

Florida during March 1987 was a non-refundable round trip ticket from San Juan to Orlando departing March 19 and returning March 23. Id. at 946 n. 37. This statement is simply inaccurate. In fact, counsel offered the sworn testimony of at least six witnesses who were prepared to testify that they were with Levy-Cordero in Florida in March 1987.

FN13. In contrast to the district court in Taylor, see 484 U.S. at 404-405, 108 S.Ct. at 650-651, the court in this case did not permit defense counsel to make an offer of proof in the form of the proposed testimony by the alleged alibi witness outside the presence of the jury. Thus, there is no record basis for its implicit conclusion that the testimony was fabricated.

The district court's opinion in this matter is detailed and comprehensive. Nevertheless, although it is a close call, we think that under the unusual facts of this case--particularly the justifiable confusion concerning the discovery order--the

court should have held a preliminary hearing to evaluate the content and reliability of the proposed alibi evidence. Cf. Taylor, 484 U.S. at 404-405, 108 S.Ct. at 650-651 (defense counsel was permitted to make an offer of proof in the form of the alibi witness's testimony outside the presence of the jury). Only after such a hearing, where the court has the opportunity to evaluate the testimony of the alleged alibi witnesses, can a finding of "fabrication" be fully justified. In addition, for the reasons discussed herein, the court should revisit its original willfulness determination and make further factual findings consistent with this opinion.

Exclusion of potentially exculpatory alibi evidence is the most severe of discovery sanctions. Because of the extreme consequences of exclusion--including the implication on defendant's Sixth Amendment rights--we conclude that the district court should have held a hearing outside the presence of the jury in which defense counsel was

permitted to present the proposed alibi testimony for the court to evaluate it both for content and reliability. [FN14] At the hearing, the court should also revisit the willfulness issue and make any further findings consistent with this opinion. We remand Levy- Cordero's case to the district court for a hearing and further factual findings consistent with this opinion. [FN15]

FN14. We note in this context, that the proposed testimony appears irrelevant if it does not place Levy-Cordero in Florida on the weekend of March 20-22.

FN15. The district court's failure to hold an evidentiary hearing Levy- Cordero's proposed alibi evidence was not "harmless beyond a reasonable doubt" because there is a "reasonable possibility" that exclusion of the proffered alibi evidence influenced the jury's verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17

L.Ed.2d 705 (1966); United States v. de Jesus-Rios, 990 F.2d 672, 678 (1st Cir.1993); United States v. Maraj, 947 F.2d 520, 526 n. 8 (1st Cir.1991). If believed by the jury, the proffered alibi evidence could have shown that Levy-Cordero was in Florida for a weekend when a government witness testified that the importation may have occurred. Moreover, the inculpatory evidence against Levy-Cordero consisted almost entirely of the testimony of two co-conspirators to the effect that Levy-Cordero participated in the March 1987 marijuana importation, and Levy-Cordero was not convicted of any of the other substantive offenses. While this testimony is sufficient to sustain Levy-Cordero's conviction, and we therefore reject his challenge to the sufficiency of the evidence, if the alibi evidence was reliable and relevant to the pertinent time period, the jury may have considered it more persuasive than the testimony of two co- conspirators.

B. Forty-Estremera

The government stipulated at trial that Forty-Estremera operated and partially owned a legitimate business, Palmetto Film and Video Productions, Inc., which produced, edited and filmed television commercials and documentaries in Puerto Rico between 1986 and 1991. Forty-Estremera maintained at trial that he was too busy with his business to have committed the overt acts alleged in the superseding indictment. To this end, Forty-Estremera and several employees of his company testified concerning Forty-Estremera's involvement with projects undertaken by his film production company during the time frame in which he was allegedly committing the drug trafficking offenses. Forty-Estremera also introduced various documents pertaining to the business, including cancelled checks, lease agreements, promissory notes, tax returns, and invoices, many of which pertained to the relevant time periods in the indictment. In addition,

Forty-Estremera moved to show a videotape depicting some of the advertising work allegedly produced by the company during the pertinent time periods. After a hearing, the district court determined that the videotape was irrelevant, and denied appellant's motion. Forty-Estremera appeals that decision.

In general, "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is inadmissible." Fed.R.Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401; United States v. Brandon, 17 F.3d 409, 444 (1st Cir.1994). We review a district court's relevancy determinations for abuse of discretion. Brandon, 17 F.3d at 444.

We think the district court acted within its discretion in excluding the videotape. During the hearing on appellant's motion, counsel for the

government informed the court that he had watched the video, and argued that the court should exclude the tape because it did not corroborate or summarize the testimony about the company, and because nothing in the tape corroborated Forty-Estremera's alibi for specific dates. In response, Forty- Estremera's counsel stated only that the material shown in the tape was produced between 1987 and 1990. Without any specific dates, the tape did not make it more probable that Forty-Estremera was too busy with his business to participate in the alleged drug activities. Moreover, even if it could be said that the videotape had some marginal probative value, the district court could have reasonable excluded it on the grounds that its probative value was substantially outweighed by considerations of waste of time. See Fed.R.Evid. 403 (authorizing exclusion of relevant evidence "if its probative value is substantially outweighed by ... considerations of waste of time"). [FN16] Accordingly, we affirm the

district court's exclusion of the videotape.

FN16. It appears that this was an alternative reason that the district court denied the motion to play the video--the court twice stated during the hearing that it did not want to waste time playing the video.

V. Alleged Juror Misconduct

The record reflects that on at least three occasions various defense counsel complained about a particular juror talking with other jurors. Counsel were unable to say for sure that the juror was talking about the case, but speculated that she was. In addition, counsel for Forty-Estremera alleges that the same juror failed to disclose during voir dire that she had previously been married to an attorney in Puerto Rico. Prior to deliberations, counsel for Forty-Estremera requested that the juror be removed. Forty-Estremera now contends that juror misconduct unfairly prejudiced him at trial.

The district court "is vested with the

discretion to fashion an appropriate and responsible procedure to determine whether [juror] misconduct actually occurred and whether it was prejudicial." United States v. Ortiz- Arrigoitia, 996 F.2d 436, 443 (1st Cir.1993) (citing United States v. Boylan, 898 F.2d 230, 258 (1st Cir.), cert. denied, 498 U.S. 849, 111 S.Ct. 139, 112 L.Ed.2d 106 (1990)). We review a determination that no misconduct occurred for "patent abuse of discretion." United States v. Newman, 982 F.2d 665, 670 (1st Cir.1992) (quoting Boylan, 898 F.2d at 258)).

In response to the complaints about the juror, the court repeatedly admonished the jury not to discuss the facts of the case. The court's instructions were clear and forceful. In addition, after the first complaint, the judge stated that he would watch the juror closely. After the third incident the judge noted that he had been watching the juror and had not observed her talking to other jurors about the case. The judge stated that he would continue to watch the juror and would

remove her for cause if he noticed any misconduct. We think this was a perfectly responsible and appropriate response by the court, particularly since counsel was unable to say that the juror was talking about the case with other jurors.

With respect to the allegations of nondisclosure, we have explained that a party seeking a new trial based on nondisclosure by a juror must "demonstrate actual prejudice or bias." United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir.1990). This "burden of proof must be sustained not as a matter of speculation, but as a demonstrable reality." United States v. Vargas, 606 F.2d 341, 344 (1st Cir.1979) (quoting United States v. Whiting, 538 F.2d 220, 223 (8th Cir.1976)). Forty-Estremera has utterly failed to sustain this burden. We find no grounds for disturbing the jury's verdict.

VI. Motions for New Trial

A. Forty-Estremera's Second Motion for New Trial [FN178

FN17. Forty-Estremera filed three motions for new trial. The first and second motions raise the same issue, but it is specifically the denial of the second motion from which he appeals. His third motion is addressed infra.

A government witness, Lelio Rigaud ("Rigaud"), testified that he had worked on the rafts that transported cocaine from the boats to shore for three cocaine shipments in which Forty-Estremera was in charge of the ground crew. Rigaud identified Forty-Estremera at trial, although he had difficulty doing so. Forty-Estremera's motion for new trial, under Fed.R.Crim.P. 33, alleged that a deputy United States marshal told Forty-Estremera and Romero-Lewis that one of the prosecutors told him during a trial recess that he had shown Rigaud a picture of Forty-Estremera before Rigaud took the stand. Prior to the evidentiary hearing on Forty-Estremera's motion for new trial, the court denied Forty-Estremera's request for a continuance

to allow him to obtain the testimony of Romero-Lewis. At the subsequent evidentiary hearing, the district court heard testimony from Forty-Estremera, the marshal in question, and a government agent who had interviewed Rigaud during the investigation. The court subsequently denied the motion for new trial. Forty-Estremera argues on appeal that the court should have granted him a continuance to obtain the testimony of Romero-Lewis, who allegedly would have corroborated Forty- Estremera's version of events.

We will reverse a district court's denial of a motion for new trial only for manifest abuse of the district court's informed discretion. United States v. Slade, 980 F.2d 27, 29 (1st Cir.1992). The district court in this case determined that it did not require the testimony of Romero-Lewis in order to make an informed decision regarding Forty-Estremera's allegations. We find no abuse of discretion. Even if Romero-Lewis' testimony would have corroborated Forty-Estremera's version of events, it would have

served only to further impeach Rigaud, whose identification of Forty-Estremera was shaky to begin with. Moreover, in the context of the trial as a whole, Rigaud was a minor witness against Forty-Estremera, and the independent evidence against Forty-Estremera was substantial. The district court did not abuse its discretion in concluding that, in all probability, the proffered new testimony would not have "result[ed] in an acquittal upon retrial" of Forty-Estremera. See United States v. Natanel, 938 F.2d 302, 313 (1st Cir.1991), cert. denied, 502 U.S. 1079, 112 S.Ct. 986, 117 L.Ed.2d 148 (1992).

B. Forty-Estremera's Third Motion for New Trial

Approximately one year and a half after trial, Forty-Estremera moved for a new trial based on alleged newly discovered evidence. On appeal, Forty-Estremera contends that the district court abused its discretion in refusing to hold an evidentiary hearing and in denying the motion.

The facts relevant to this issue are as follows.

The superseding indictment charged co-conspirator Castro-Gomez with one count of conspiracy to smuggle cocaine and marijuana into the United States and two counts of possession with intent to distribute 5,000 pounds of marijuana. In July 1992, Castro-Gomez entered a plea agreement with the government in which he agreed to plead guilty to the conspiracy count, and the government agreed to dismiss the possession counts. Castro-Gomez was subsequently sentenced to ten years in prison. In November 1992, just prior to commencement of trial, counsel for Forty-Estremera and counsel for Levy-Cordero visited Castro-Gomez and his attorney in prison. Under advice from counsel, Castro-Gomez allegedly informed appellants' counsel that he would not testify for any party at trial for fear of incriminating himself. He also allegedly stated that he would not testify on behalf of any defendant even if he was subpoenaed and threatened with sanctions.

On November 24, 1992, Castro-Gomez filed an informative motion with the district court telling the court of his desire not to testify, and noting his Fifth Amendment and Due Process concerns. None of the defendants attempted to subpoena Castro-Gomez or call him as a witness at trial. On July 11, 1994, Forty-Estremera filed a motion for new trial based on newly discovered evidence, consisting of two sworn affidavits by Castro-Gomez stating that Forty-Estremera was not one of the persons involved in the March 1987 importation of 5,000 pounds of marijuana.

This circuit uses a four-part test to evaluate a request for new trial based on newly discovered evidence. Under this test, the district court will grant a new trial only if it finds that: "(1) the evidence was unknown or unavailable to the defendant at the time of trial; (2) the failure to learn of it was not a result of the defendant's poor diligence; (3) the new evidence is material; and (4) the impact of the new evidence is so strong that an

acquittal would probably result upon retrial." Slade, 980 F.2d at 29. The burden is upon the defendant to establish each of these requirements, and we review a district court's denial of a motion for new trial only for manifest abuse of discretion. Id.

Castro-Gomez' informative motion to the court states that he "begs the parties at this trial not to serve any subpoenas or call him to the witness stand." (emphasis in original). It also states that if he is called to the stand "he may self-incriminate as to probable pending indictments." And that he "may expose himself to a contempt predicament" if testifying would jeopardize his scheduled release from prison. Most notably, the motion concludes by requesting that the court protect him "from a trial's cross-fire" and appoint counsel to "allow adequate time to advise defendant properly on any and all avenues available to him and of the possible legal consequences in this case if he is forced to take the stand and testify...." (emphasis added).

As the district court noted, although Castro-Gomez' motion indicates that he is reluctant to testify, and that he desires protection from the court, it simply does not demonstrate that his testimony is unavailable. Indeed, the last sentence quoted above indicates that he anticipated being forced to take the stand and testify. Nevertheless, Forty-Estremera never sought to subpoena Castro-Gomez or compel him to testify. Under such circumstances, we conclude that the district court did not abuse its discretion in concluding that appellant failed to establish that Castro-Gomez' testimony was unknown or unavailable. We also note that appellant failed to establish that his failure to learn of the testimony was due to anything but his own lack of diligence. We therefore affirm the district court's denial of Forty-Estremera's motion for new trial.

C. Levy-Cordero's Motion for New Trial

Levy-Cordero also filed a motion for new trial based on the testimony of Castro-Gomez.

Levy-Cordero alleges that Castro-Gomez also could have exculpated him by testifying that he was not involved in the March 1987 importation of marijuana. In addition, Levy-Cordero alleges that the reason Castro-Gomez did not testify was because the prosecutor had threatened to bring additional charges against Castro-Gomez if he exculpated Levy-Cordero. See United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (governmental interference with a witness may deprive a defendant of due process of law); United States v. Hoffman, 832 F.2d 1299, 1303 (1st Cir.1987).

"It is a bedrock rule that when a party has not presented an argument to the district court, [he] may not unveil it in the court of appeals." United States v. Slade, 980 F.2d 27, 30 (1st Cir.1992) (collecting cases). The only time Levy-Cordero raised the specter of witness tampering before the district court was in the most tangential of allusions in his reply to the government's opposition to his

motion for new trial. At that time, counsel for Levy-Cordero stated that during his preparation for trial he interviewed Castro-Gomez who stated that he "was reluctant to testify in court for fear of damaging his 'good deal' and further fearing the 'wrath' of" the United States Attorney. Counsel also stated that Castro-Gomez had indicated that Levy-Cordero was involved in the load charged in the indictment. These vague allusions, which were not even accompanied by a contention that this constituted witness tampering, are not sufficient to preserve the issue for appeal. Id. ("Passing allusions are not adequate to preserve an argument in either a trial or an appellate venue."); United States v. Zannino, 895 F.2d 1, 17 (1st Cir.) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.") (internal citations and quotation marks omitted), cert. denied, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

Moreover, the reply brief indicates that counsel for Levy-Cordero possessed this information prior to trial. Notwithstanding his knowledge of these serious allegations prior to trial, counsel for Levy-Cordero never brought them to the attention of the district court prior to or during trial. Nor did he call Castro-Gomez as a witness. In addition, Castro-Gomez' informative motion provides no evidence of witness intimidation, and does not indicate that he would have refused to testify if called as a witness. Levy- Cordero had the information necessary to raise this before the district court. Because he failed to do so, and because no exceptional circumstances exist to excuse that failure, we deem the argument waived. See Slade, 980 F.2d at 30.

VII. Sufficiency of the Evidence

A. Attempted Importation

Romero-Lewis argues that the evidence is insufficient to sustain his conviction for attempting to import cocaine on March 30, 1990, because it

establishes only a "preliminary plan" to import cocaine. "To prove a charge of attempt, the government must show beyond a reasonable doubt the defendant's intent to commit the offense charged and that the defendant performed a substantial step toward the commission of the offense." DeMasi, 40 F.3d at 1315 (citing United States v. Argencourt, 996 F.2d 1300, 1303 (1st Cir.1993), cert. denied, 510 U.S. 1061, 114 S.Ct. 731, 126 L.Ed.2d 694 (1994)). This step must be " 'more than mere preparation' " but " 'less than the last act necessary before the actual commission of the substantive crime.' " Argencourt, 996 F.2d at 1303 (quoting United States v. Chapdelaine, 989 F.2d 28, 33 (1st Cir.1993)).

The evidence, presented in the light most favorable to the verdict, established the following. On the night of March 30, 1990, several co-conspirators were in their respective duty stations preparing to receive a load of cocaine which was to be dropped from a plane travelling from Colombia.

Romero-Lewis was in a boat at sea waiting to assist in the off-loading of the cocaine. Eventually, Romero-Lewis contacted the other conspirators and informed them that the plane en route from Colombia was being followed, and would not be able to make the drop.

This evidence is clearly sufficient to support the inference that Romero-Lewis intended to participate in the importation of the cocaine. It is also sufficient to show that the conspirators, including Romero-Lewis, had taken a substantial step to complete the importation. All systems were go, and all the conspirators were in their places waiting to complete the transaction. The evidence supports the inference that, if not for the suspected surveillance of the Colombian plane, the importation would have transpired as planned. We therefore find no basis for disturbing the jury's verdict on the attempted importation count.

B. Variance between Indictment and Proof

Romero-Lewis argues that the evidence is

insufficient to sustain his conviction for conspiracy to possess with intent to distribute more than 10,000 kilograms of cocaine and more than 1,000 kilograms of marijuana (Count 1). Appellant maintains that the evidence at trial proved the existence of two conspiracies, one to import and distribute marijuana and one to import and distribute cocaine. Because he was only directly implicated in the substantive offenses involving cocaine, Romero-Lewis contends that the jury could not properly convict him of any conspiracy that involved marijuana.

We review this claim to determine whether there is sufficient evidence to support the jury's verdict. United v. Sepulveda, 15 F.3d 1161, 1191 (1st Cir.1993). We conclude that there was no material variance between the conspiracy charged and the conspiracy proven at trial. See Boylan, 898 F.2d at 246-47. The evidence at trial was sufficient for a rational jury to find the existence of a single conspiracy to import marijuana and cocaine, as

alleged in the superseding indictment.

There was evidence at trial which, if believed, tended to show the following. The conspiracy extended over several years under the common leadership of Rosa- Collazo and Manolo Forty. The goal of the conspiracy remained constant--to import illegal narcotics into Puerto Rico for subsequent distribution. The operating procedure rarely varied. The illegal drugs were either airdropped or the conspirators would meet a mothership at sea. The drugs would be brought near the shore by boat, and then usually transferred to shallow rafts and brought to shore. They would then be stored in a house pending distribution. Most members of the conspiracy participated in multiple importations. Moreover, the members had clearly defined roles with respect to the importations, and those remained relatively constant throughout the conspiracy. All these factors are important "indicia of unitariness." Sepulveda, 15 F.3d at 1191. We find no basis for

disturbing the jury's verdict.

CONCLUSION

For the reasons stated herein, we affirm the convictions of Jose Samuel Forty- Estremera and William Romero-Lewis. We remand the case of Victor Levy-Cordero to the district court for a hearing and findings consistent with this opinion. We retain appellate jurisdiction over the case of Levy-Cordero, and direct the district court to report back to this court within 60 days on the status of the case.

COFFIN, Senior Circuit Judge (concurring).

I agree with the disposition of this appeal, but wish to express my view that certain of the court's observations with respect to the district court's exclusion of Levy-Cordero's alibi evidence are premature. In my view, further factual inquiry is necessary before we can evaluate the court's determinations regarding the seriousness of any government misleading, the unimportance of the contradictions in defense counsel's chronology of

events leading to the supposed discovery of the alibi, and the absence of notice of discovery obligations. I therefore would await the results of the hearing that will be held on remand before commenting on the strength of the district court's willfulness finding.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1679

UNITED STATES,

Appellee,

v.

VICTOR-LEVY-CORDERO,

Defendant - Appellant.

No. 93-2015

UNITED STATES,

Appellee,

v.

WILLIAM ROMERO-LEWIS,
A/K/A CACO, EL TENIENTE,

Defendant- Appellant.

No. 93-2087

UNITED STATES,

Appellee,

v.

JOSE SAMUEL FORTY-ESTREMERA,

a/k/a SAMMY,

Defendant - Appellant.

Before

Torruella, Chief Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

ORDER OF COURT

Entered November 7, 1995

The United States of America has filed a "Motion for Modification and Correction of Opinion" seeking two changes in the Court's opinion. The following is the disposition of said requests.

1. Footnote 1 is amended to read "twelve years" in substitution of "twelve months."

2. The last full paragraph of page 13 of the opinion of the Court is amended to read:

For the foregoing reasons, we conclude

that the improper remarks were not so prejudicial as to require reversal. Notwithstanding our decision in this regard, we repeat our concern that, "after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk." United States v. Ortiz-Arrigoitia, 996 F.2d 436, 441 (1st Cir. 1993)(collecting cases). See, e.g., Udechukwu, 11 F.3d 1101; Arrieta-Agressot, 3 F.3d 525. When, as in this case, a visiting Justice Department prosecutor conducts the trial, we nevertheless expect the resident United States Attorney to insure that the expectations of the court concerning closing argument be made known.

It is so Ordered.

By the Court:

FRANCIS P. SCIGLIANO,

Clerk.

By JANICE M. O'NEIL

Chief Deputy Clerk.

[cc: Messrs: Weiner, Geigel, Inserni and Ms. Mitchell]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR. NO: 91-299
	)	(RLA)
VICTOR LEVY CORDERO,	)	
	)	
Defendant.	)	
_____	)	

HEARING ON ALIBI EVIDENCE

BE IT REMEMBERED that the above entitled action came on for hearing before the HONORABLE RAYMOND L. ACOSTA, sitting at Hato Rey, Puerto Rico, on the 18th day of January, 1996.

Appearances:

For the Plaintiff: AUSA Ronald M. McNeil

For the Defendant: Jeffrey Weiner, Esq.

ARTHUR G. PINEDA, OCR
Federal Building, Rm. G-40
150 Chardon Avenue
Hato Rey, Puerto Rico 00918
(809) 766-4319

THE COURT: The Court after hearing all the evidence gives its ruling as follows:

Pursuant to the instructions of the Court of Appeals for a hearing on remand, the Court hereby finds that the evidence presented in support of an alibi defense during the course of this hearing was reliable.

Further, having heard Mr. Moore's explanation and belief with respect to his interpretation of the Court's Omnibus Order vis a vis a Government initiated Rule 12.1 written demand, the Court further finds that the failure to notify the alibi defense at an earlier date was not

willful.

Lastly, counsel's request for a bond is hereby denied. The Court Reporter is hereby instructed to transcribe this order forthwith which the Clerk of this court shall transmit without delay to the Court of Appeals.

3.

REPORTER'S CERTIFICATE

I, ARTHUR G. PINEDA, Official Court Reporter for the United States District Court for the District of Puerto Rico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct computer aided transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

_____

ARTHUR G. PINEDA
Official Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1679

UNITED STATES,

Appellee,

v.

VICTOR-LEVY-CORDERO,

Defendant - Appellant.

No. 93-2015

UNITED STATES,

Appellee,

v.

WILLIAM ROMERO-LEWIS,
A/K/A CACO, EL TENIENTE,

Defendant- Appellant.

No. 93-2087

UNITED STATES,

Appellee,

v.

JOSE SAMUEL FORTY-ESTREMERA,

a/k/a SAMMY,

Defendant - Appellant.

Before

Torruella, Chief Judge,
Coffin and Cyr, Senior Circuit Judges.

Jeffrey S. Weiner, Linda L. Houghtaling and Jeffrey S. Weiner, P.A. on brief, for appellant.

James K. Robinson, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Theresa M.B. Van Vliet, Chief, Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice, and Grace Chung Becker, Trial Attorney, Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice, on brief, for appellee.

September 17, 1998

Torruella, Chief Judge. In United States v. Levy-Cordero, 67 F.3d 1002 (1st Cir.1995) (Levy I), this court heard the appeals of three co-defendants convicted, inter alia, of taking part in a conspiracy

to possess with intent to distribute over 1,000 kilograms of marijuana. We rejected the appeals of two of the defendants, but found that an error had been made in the trial of the third, Victor Levy-Cordero. The trial court had erred as a matter of law when it excluded proffered evidence that Levy was in Florida during the same time that he was allegedly taking part in a large transfer of marijuana. See Id. at 1015. The district judge excluded this evidence as a sanction for defense counsel's alleged willful violation of a discovery order requiring pre-trial notice of intent to offer an alibi defense. See United States v. Levy Cordero, 833 F.Supp. 938 (D.P.R.1993). However, it was later discovered that while similar discovery orders had issued to other defendants in the case, no such order had issued to Levy. See Levy I, 67 F.3d at 1014. We therefore ordered the district court to conduct a hearing to determine the reliability of the evidence that Levy was in Florida between March 19, 1987, and March 28 or 29, 1987. See Id. at 1015. Now,

based upon the evidence adduced at that hearing coupled with further analysis of the trial transcript from the underlying trial, we affirm Levy's conviction.

BACKGROUND

The following facts were uncontradicted at trial, or were necessarily found by the jury to support the convictions of Levy's co-conspirators, William Romero-Lewis and Jose Samuel Forty-Estremera. On or about March 7, 1987, a group of co-conspirators rented a house near Naguabo, Puerto Rico, in order to stash large amounts of marijuana which would be arriving by ship from Colombia. Over the course of one weekend in March 1987, spanning from Friday to Sunday nights, the co-conspirators moved 5,000 pounds of marijuana from the Colombian ship near the Puerto Rican coast into a smaller boat, then onto the beach and into the stash house. They were later paid in cash and drugs. Levy was alleged to have taken part in this off-loading.

Throughout this case, the specific dates of the off-loading of the marijuana have been at issue. However, by a process of elimination, we can determine that the jury found the exact dates of the off-loading to be March 27, 28 and 29, 1987. As stated above, there was uncontradicted evidence at trial that the off-loading took place over three nights on a Friday, Saturday, and Sunday in March 1987. [FN1] The jury was instructed by the judge and by both parties in closing arguments that defendants must be acquitted for any actions occurring on the weekend of March 13-15 (or before) because they were beyond the statute of limitations. Because Levy-Cordero was convicted, the jury must have concluded, consistent with the evidence adduced at trial, that the off-loading occurred on one of the two remaining weekends, either March 20-22 or March 27- 29.

FN1. While the government has, at times during this case, suggested that the load may have arrived on the April 4-6 weekend, the evidence at trial did

not support that chronology.

However, this does not exhaust our knowledge about the dates at issue. At trial, both parties agreed that a co-conspirator by the name of Cesar Castro-Gomez was present during the off-loading. The jury was also presented with stipulated evidence proving that Castro was in Florida during the March 20-22 weekend. Thus, the jury must have concluded that the drugs were off-loaded on March 27-29, 1987. [FN2]

FN2. The significance of co-conspirator Castro's presence in Florida during the March 20-22 weekend went unnoticed by this court in Levy I, when we expressed uncertainty as to whether the jury concluded that the off-loading occurred on the weekend of March 20-22 or March 27-29. See 67 F.3d at 1013. This uncertainty can be further attributed to our failure to fully appreciate Miles Johnson's trial testimony. While our Levy I opinion noted

Johnson's testimony that the load arrived a "week or two" after the stash house was rented, which could support the conclusion that the drugs arrived on the March 20-22 weekend, see 67 F.3d at 1012, a more thorough reading of his testimony reveals that he offered inconsistent testimony about whether the drug trafficking occurred on the March 20-22 weekend or the March 27-29 weekend. When coupled with the impossibility of Castro's participation in the off-loading during March 20-22, a fact which was highlighted by both parties in closing arguments, Johnson's testimony requires the conclusion that the drugs arrived on the March 27-29 weekend.

While his trial was in progress, Levy claims to have remembered where he was from March 19, 1987, through March 28-29, 1987. He allegedly traveled to Gainesville, Florida, to attend the National Hot Rod Association Gator Nationals drag races, occurring during the March 20-22 weekend.

He then supposedly stayed in Florida until March 28 or 29. Levy's lawyer researched the alibi, and eventually concluded that the Florida alibi was "airtight," and that he could "account for [his] client's presence from the 19th to the 28th or 29th, that accounts for every possible date the witnesses claim the load occurred." His lawyer brought this information to the court's attention, and, after a contentious hearing on the admissibility of the evidence, the district court excluded it, concluding that the defense had willfully withheld the evidence from the prosecution and the court in violation of Fed.R.Crim.P. 12.1.

On appeal, we determined that, given the ambiguous text of the district court's Omnibus Order relating to alibi evidence, and the absence of an explicit Rule 12.1(a) demand from the prosecution that Levy serve written notice of intent to offer an alibi, the district court's exclusion of Levy's potentially exculpatory alibi evidence was legal error. We ordered the district court to

evaluate the content and reliability of the alibi evidence.

At his hearing on remand, Levy's "airtight" Florida alibi changed significantly from the story that he had told to the district court and this court the first time around. Despite promises that his Florida whereabouts from March 19 to March 28-29, 1987 would be documented with extensive records, photographs, and witness testimony, Levy was unable to turn up any documentary evidence that he was in Florida after March 24, 1987. Instead, Levy's alibi witnesses surprisingly testified unanimously at the hearing on remand that Levy was in Puerto Rico with them on Friday, Saturday and Sunday nights from March 27 to March 29, 1987. Whether or not the witnesses' testimony is true, it is now undisputed that Levy's story has changed, and that he was not in Florida on that weekend.

ANALYSIS

I. The Old Story

The purpose of the remand in this case was to determine whether the district court's error in excluding Levy's Florida alibi was harmful to Levy, i.e., whether it influenced the jury's verdict and thus affected Levy's substantial rights at trial. See Levy I, 67 F.3d at 1015 n. 15; see also, 28 U.S.C. § 2111 (trial error is harmless if it does not affect substantial rights); Lataille v. Ponte, 754 F.2d 33, 37 (1st Cir.1985) (same); Fed.R.Crim.P. 52 (defining "harmless error" as "any error, defect, irregularity or variance which does not affect substantial rights"). If the evidence presented on remand was sufficiently reliable to allow a jury to find that Levy was in Florida at the time he was convicted of having off-loaded 5,000 pounds of marijuana, his substantial rights at trial would have been affected by the improper exclusion of that evidence. See United States v. Mulinelli-Navas, 111 F.3d 983, 992 (1st Cir.1997) (improper exclusion of reliable alibi

evidence violates Sixth Amendment right to confrontation). A new trial must be ordered whenever substantial rights are affected by an error at a criminal trial and the government cannot prove harmlessness "beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Brennan, 994 F.2d 918, 927 (1st Cir.1993) (where violation of Sixth Amendment right to confrontation is discovered on appeal, Chapman 's harmless error standard is applied).

However, it is obvious that exclusion of a false or utterly unreliable alibi does not affect substantial rights. The story that Levy presented to this court prior to remand, i.e., that he was in Florida for most of the March 27-29, 1987 weekend, was recanted on remand. Levy himself presented numerous witnesses who testified that Levy was in Puerto Rico at that time. We can, therefore, state with certainty that the district court's failure to place before the jury any evidence that Levy was in

Florida during the relevant weekend was "harmless beyond a reasonable doubt."

II. The New Story

As explained above, a curious and surprising development occurred on remand when Levy abandoned his claims of having been in Florida until March 28 or 29, 1987, and presented an entirely new alibi for the weekend of March 27-29, 1987. He now claims to have spent that time in Puerto Rico with three close friends, washing their cars and installing new tires. This evidence was never proffered at trial, and was thus outside of the scope of the remand which was ordered to determine the reliability of the proffered and excluded alibi evidence.

Nonetheless, in an ambiguous half-page ruling issued after the hearing on remand, the district court took no explicit notice of the fact that Levy's alibi had been changed. In fact, no specific factual findings were issued whatsoever. The ruling merely found that "the evidence presented

in support of an alibi defense during the course of this hearing was reliable." According to Levy, this ruling should be construed as a finding of fact that all of his alibi evidence, including his new Puerto Rico alibi, is reliable evidence. In light of the fact that most of the testimony adduced at the hearing pertained to this new alibi, we agree that Levy's proposed construction of the ruling is sensible. We must, therefore, determine what effect, if any, this finding has.

Despite the fact that Levy's whereabouts for the March 27-29 weekend had been very much at issue for years, the evidence that Levy was in Puerto Rico with friends working on cars had never been proffered. Nonetheless, it was this evidence which was placed into the record on remand. Although we could not have foreseen that Levy would be allowed to proceed as he did on remand, see United States v. Bell, 988 F.2d 247, 250 (1st Cir.1993) (an appellate disposition of an appeal must be read by the district court "against the

backdrop of prior proceedings in the case"); United States v. Cornelius, 968 F.2d 703, 706 (8th Cir.1992) (a limited remand does not automatically rejuvenate other issues in a case), we recognize that in some situations, the trial court may possess limited discretion to examine or re-examine issues or evidence outside of the four corners of the remand. See Bell, 988 F.2d at 250-51 ("even where, as here, an appellate court's mandate does not contemplate resurrecting an issue on remand, the trial court may still possess some limited discretion to reopen the issue in very special situations."). Thus, rather than ignoring this new alibi evidence and any findings thereupon as being outside the scope of the remand, we will assume that the trial court exercised its limited discretion to hear this portion of his current alibi as "newly discovered evidence." See Id. at 251 (exercise of limited discretion to reopen issues on remand may be appropriate to hear significant new evidence not earlier obtainable in the exercise of due diligence); see generally, 3

Charles Alan Wright, Federal Practice and Procedure; Criminal 2d, § 557 (2d ed.1982) (potentially exculpatory evidence not proffered at trial can be considered as newly discovered evidence under Fed.R.Crim.P. 33).

A district court may only hear newly discovered evidence after the close of a criminal trial in order to determine whether the evidence is sufficient to warrant a new trial. See Fed. R. Crim P. 33. The standard for granting a new trial based upon newly discovered evidence is "that the evidence must be newly discovered, that it must be material to the issues, that it must be such as to have some effect on the outcome ... and that the failure to obtain the evidence not be due to a lack of diligence on the part of the defendant." Vega Pelegrina v. United States, 601 F.2d 18, 20-21 (1st Cir.1979).

Unfortunately for Levy, the new alibi evidence does not even approach this standard. Almost nine years after Levy was alleged to have

off-loaded 5,000 pounds of marijuana, he presented evidence, in the form of the testimony of a few of his close friends, that he was working on cars all during the weekend in question. Despite the fact that the friends' memories were remarkably clear about many of the details of the weekend, this story never surfaced during the entire three-year period between his indictment, in March 1992, and the oral argument before this court in Levy I. Levy did not argue, and could never hope to argue persuasively, that this alibi could not have been obtained through the exercise of due diligence on his part, because the new evidence involved his own whereabouts during the weekend in question. A convicted criminal cannot successfully lay claim to a new trial when, years after his conviction, his friends suddenly provide a new alibi unsupported by anything other than their collective word. Thus, as a matter of law, Levy's new alibi evidence is insufficient to warrant a new trial and must be disregarded. The district court's finding that this

new evidence is credible is insufficient, under these circumstances, to satisfy the rigorous requirements justifying a new trial.

CONCLUSION

For the reasons discussed herein, the district court's original judgment is affirmed. We have also considered and rejected Levy's allegations of prosecutorial misconduct.